

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION  
HONORABLE ANDRÉ BIROTTE JR., U.S. DISTRICT JUDGE

UNITED STATES OF AMERICA, )  
)  
PLAINTIFF, )  
)  
vs. ) No. CR 17-0404-AB  
)  
1) ARLAN WESLEY HARRELL, )  
2) JOHN RICHARD BRINSON, JR., )  
4) KEITH ALLEN LAWNICZAK, )  
)  
DEFENDANTS. )  
\_\_\_\_\_ )

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THURSDAY, OCTOBER 17, 2019

10:14 A.M.

LOS ANGELES, CALIFORNIA

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1 LOS ANGELES, CALIFORNIA; THURSDAY, OCTOBER 17, 2019

2 10:14 A.M.

3 - - -

4 THE CLERK: Calling Criminal Case 17-0404-AB,  
5 United States of America versus Arlan Wesley Harrell; John  
6 Richard Brinson, Jr.; Keith Allen Lawniczak.

7 Counsel, please step forward and state your  
8 appearances.

9 MS. MYERS: Good morning, Your Honor.

10 Devon Myers on behalf of the United States.

11 MS. KUPERSMITH: Along with Lauren Kupersmith on  
12 behalf of the United States.

13 THE COURT: Good morning to you both.

14 MR. CASTILLO: Good morning as well, Your Honor.

15 Pedro Castillo on behalf of Arlan Wesley Harrell  
16 who is present in custody.

17 THE COURT: Good morning.

18 MR. NICOLAYSEN: And good morning, Your Honor.

19 Greg Nicolaysen, counsel of record for Mr. Brinson  
20 who is also present in custody.

21 THE COURT: Good morning to you both.

22 MR. NISHI: Tom Nishi on behalf of Keith Lawniczak  
23 who is present in court.

24 THE COURT: Good morning to you both.

25 Mr. Nishi, if you wouldn't mind, I think there is

1 a microphone behind the screen in front of you. Just bring  
2 that closer to you so we can hear you.

3 We are here today to discuss a number of matters.  
4 I guess first off -- apologize for the confusion.

5 I hope, Mr. Nicolaysen, all was resolved last week  
6 with Mother Nature.

7 MR. NICOLAYSEN: Yes, finally over the weekend. I  
8 thank Your Honor for understanding the 14 and where it  
9 connects to the 5 were shut down, and I simply couldn't get  
10 out of the Valencia area.

11 THE COURT: But your home is okay?

12 MR. NICOLAYSEN: It is fine. I thank Your Honor  
13 for asking.

14 THE COURT: I know there were some fits and starts  
15 getting Mr. Lawniczak here. I know there are various  
16 stakeholders involved in the case. So I apologize for  
17 having to move the dates, but we're here now, and,  
18 hopefully, we can resolve the matters at hand today.

19 We have a number of motions to suppress both  
20 statements and evidence and then a motion to sever.

21 What I would propose is I want to just go through  
22 the motions somewhat one by one, give the parties time to  
23 argue anything further, and then I will give the parties my  
24 thoughts as it relates to the motion.

25 We could start off with Mr. Harrell's statements

1 that he made on the May 28th, 2017, interview. So I guess  
2 it would be Mr. Nicolaysen. Do you wish to be heard as  
3 relates to that?

4 MR. NICOLAYSEN: Your Honor, Mr. Castillo  
5 represents Mr. Harrell.

6 THE COURT: Sorry. I'm getting --

7 MR. NICOLAYSEN: Your Honor, I am fine. If the  
8 Court wishes to start with Mr. Brinson, we can do that.  
9 Whatever the Court pleases.

10 THE COURT: Let's start with Mr. Harrell because  
11 he has a number of motions filed. So, Mr. Castillo, my  
12 apologies.

13 MR. CASTILLO: Yes, the motion to suppress  
14 statement, Your Honor?

15 THE COURT: Yes.

16 MR. CASTILLO: So, Your Honor, I am sure the Court  
17 has read the papers --

18 THE COURT: Yes.

19 MR. CASTILLO: -- as the Court indicated.

20 So our argument is the statements that Mr. Harrell  
21 made on the day that he was arrested, the day that the  
22 agents came to his house should not be admissible because  
23 repeatedly during that questioning by the Homeland Security  
24 special agents he requested a lawyer.

25 He asked more than once, "I want a lawyer. I want

1 a lawyer. I want a lawyer." And the agents ignored that  
2 request and simply continued asking questions.

3 THE COURT: Now, the government has indicated that  
4 they don't intend to introduce any statements that were made  
5 after he made a request for a lawyer. So I am trying to  
6 understand sort of from your perspective where you think  
7 that line, if any, should be drawn.

8 MR. CASTILLO: I think, Your Honor, it should  
9 begin right at the advisement of Miranda. In other words, I  
10 think I submitted a transcript --

11 THE COURT: Right.

12 MR. CASTILLO: -- today to my motion, and I would  
13 say anything after the second page where they advise him of  
14 Miranda, "You have the right to consult with a lawyer" --

15 THE COURT: I thought he says, "Yeah," and he  
16 says, "So this is the interview right now."

17 MR. CASTILLO: And I think that's the issue,  
18 Your Honor. Mr. Harrell had never been arrested before. He  
19 is a young man as the Court can see, never had, I don't  
20 think, as much as a traffic ticket.

21 So here come armed Homeland Security agents, a  
22 whole bunch of them, to his home in the early morning with  
23 firearms, and they sequester him, start questioning him. He  
24 doesn't know what's happening.

25 His statement the interview, "Is this the

1 interview right now," is very significant because it means  
2 you guys want to talk to me? Shouldn't I have a lawyer?  
3 And we see that from the subsequent statements where he  
4 says -- the agent says, "Do you understand -- do you want to  
5 read these rights?" He says, "I think I understand."

6 THE COURT: Right.

7 MR. CASTILLO: So that to me is significant  
8 because he didn't understand.

9 THE COURT: But then what should the Court do with  
10 the fact that I thought it was right after that exchange  
11 then he's given a written statement of rights and a waiver  
12 form and he signs that.

13 Does that suggest, then, that there is a  
14 preliminary discussion, the written waiver and the signature  
15 confirms what they had just discussed or --

16 MR. CASTILLO: We do have a signed waiver,  
17 Your Honor. It's not clear to me from listening to the  
18 audio and watching -- listening to the audio, rather,  
19 because it is only an audio, whether he signs it there right  
20 at the moment where he says, "I think I understand," or  
21 whether he signs it afterwards.

22 We don't have a declaration from either one of the  
23 two agents that are present there. We only have -- the  
24 government did not submit any declarations. So we don't  
25 know. I presume the agents would say that he signed it

1 around that time. But even if he did, Your Honor, I think  
2 the question is the same.

3 He says right after that -- talks about his  
4 parents, talks about whether his parents can, sort of, not  
5 know about this. They seem to tell him, "Well, this is your  
6 chance. This is your time to talk. It's a one and only  
7 deal."

8 All those are things to a young man figuring out  
9 whether he should talk, whether he has a right to a lawyer,  
10 whether -- what he has to say to assert those rights, I  
11 think that that's significant. So I would say that anything  
12 after the Miranda advisement should not be admissible.

13 THE COURT: What about later on during the course  
14 of the interview? They take a break, and then one might  
15 argue he just starts talking again.

16 So let's assume I agree with you as relates to the  
17 first part. But then what happens later? It's about 15 or  
18 16 minutes in when he starts talking again, not in response  
19 to any questions. He just starts talking.

20 MR. CASTILLO: And I think, Your Honor, if I  
21 remember correctly, I think he's cold. I think they offer  
22 him some type of sweatshirt or jacket or something, and I  
23 think that's the break. There is a break.

24 There is a transition, and I would say that that  
25 again is sort of the agents playing him. At one point they



1 ask him, "Do you want some gum?" These are federal agents  
2 who are coming to arrest him for some serious charges, and  
3 they ask him if he wants some gum.

4 THE COURT: Is it your position that the agents  
5 might have set up this scenario, if you will, to ask some  
6 preliminary questions in the hopes that he might just start  
7 talking again?

8 MR. CASTILLO: I think we have a young man who is  
9 not sophisticated when we have these very two seasoned  
10 Homeland Security agents who know how to get confessions.  
11 We'll see that especially related to Mr. Brinson's motion  
12 because Agent Squire was also there questioning Mr. Brinson.

13 But we have agents who know how to play people by  
14 trying to be their friend, by trying to tell them, "This is  
15 really your chance." I think it makes those statements not  
16 voluntary. So I would say the Court should suppress those  
17 statements.

18 THE COURT: Let's talk about the statements that  
19 were made in the car on the ride to Roybal.

20 How should the Court weigh those statements in the  
21 overall context where it appears that they ask him if he  
22 understood his rights. They start reading from a card, and  
23 he says, "I understand them," and he's willing to talk at  
24 that time.

25 Does that suggest a knowledge of his -- a knowing

1 waiver that occurred earlier when he was originally  
2 arrested?

3 MR. CASTILLO: I don't think it relates back,  
4 Your Honor. Two days lapse. The arrest was May 28th. The  
5 statement was in the vehicle while he is being transported,  
6 is May 30th. He's had some time to sit.

7 And the government would want the Court to have it  
8 relate back to the original Miranda, I guess, waiver, the  
9 government would call it.

10 But I don't think it does because that's a  
11 separate statement, and that's a statement where he's had  
12 some time to think, I guess, and sit.

13 I think he's still confused about whether he --  
14 when he is going to get a lawyer because they're still in  
15 that second May 30th, statement. There is some questions  
16 about procedure and when his lawyer will be appointed.

17 The agents talk about what's going to happen in  
18 court, that he may get bail, he may not get bail, he is  
19 going to have a lawyer.

20 So I think that is separate. The government would  
21 want the Court to make that link, but I -- my argument would  
22 be that it does not in any way relate back to the statement  
23 on the day of his arrest.

24 THE COURT: All right. And if you don't mind I  
25 may do a little bit of a -- for lack of a better term, sort

1 of back-and-forth tennis match as we go through these  
2 issues.

3 Let me hear from the government as it relates,  
4 again, focusing on the statements, Ms. Kupersmith. And  
5 thank you again for flying out.

6 MS. KUPERSMITH: No problem, Your Honor.

7 Your Honor, it's -- it sounds like defendant's  
8 argument boils down to that he wasn't being familiar with  
9 the process of being arrested, but that is certainly not the  
10 standard.

11 And I think the transcript shows there were a  
12 number of opportunities prior to his invocation of counsel  
13 that he is provided his rights and he acknowledges he  
14 understands.

15 THE COURT: What are about Mr. Castillo's point --  
16 "Do you understand these rights?" and his words are, "I  
17 think I understand."

18 MS. KUPERSMITH: I think you can't take that out  
19 on of context what happened the several minutes before where  
20 there was five other acknowledgements that he understood his  
21 rights.

22 And I think even just the context of that  
23 statement, he's asked, "So do you understand? Do you want  
24 to read these rights?" and he says, "I think I understand,"  
25 which is --

1 THE COURT: But do you think -- and I am sorry to  
2 interrupt you.

3 MS. KUPERSMITH: No problem.

4 THE COURT: Do you think there is this -- I think  
5 acknowledgements when he says, "So this is the interview  
6 right now?" Does that suggest an acknowledgment? Or is it  
7 more like what Mr. Castillo says, he doesn't know what's  
8 happening, where he is, this is his first time in this  
9 situation.

10 Does that -- how much weight should the Court give  
11 to that in determining what he says? I think I understand  
12 that maybe he doesn't understand what's happening.

13 MS. KUPERSMITH: I think, Your Honor, you have to  
14 take in the context of everything that happened. So if I  
15 could just go through the order of events that what happened  
16 is he's read his rights. He is asked specifically, "Do you  
17 understand this?" He says, "Yes." That's number one.

18 He then confirms that this is the interview. He  
19 was told it was, and he says, "Okay." That in and of itself  
20 is a second understanding that he understands that this is  
21 an interview and that this is his chance to make statements.  
22 That's number two.

23 Third is he has confirmed again -- the agent says  
24 to him, "I mean you good, you good to talk?" And his  
25 response is, "Yes, yes."

1           Number four is he then says -- the agent says to  
2 him, "So do you understand? Do you want to read these  
3 rights?" And he says, "I think I understand."

4           That is not an indication that he doesn't  
5 understand. It is not an indication that he wants to stop.  
6 He is acknowledging the fact that the agent confirms, "Do  
7 you want to read these," but it doesn't end there either.

8           Number five is at this point the recording is  
9 pretty clear that the form is filled out at this point. It  
10 says -- the agent says, "So this is the form that says you  
11 understand your rights," and he is specifically asked how to  
12 spell his name.

13           So pretty clear that the form is being filled out  
14 at that time, which is Number 5 of his opportunity to  
15 understand and acknowledge his rights.

16           And I would submit, Your Honor, that beyond that,  
17 he is able to coherently and intelligently answer questions,  
18 which is also acknowledging that he understands what is  
19 going on, he understands his opportunity to participate in  
20 this interview.

21           It's not necessary to acknowledge his  
22 understandings in writing even though he does, and his  
23 participation is an implicit waiver of his willingness to  
24 talk.

25           And I think, then, his acknowledgment later, when

1 he does ask for a lawyer, is also understanding that he  
2 understands his right to ask for a lawyer.

3 THE COURT: Can one make the argument that perhaps  
4 the lightbulb went off later in the interview, he is saying,  
5 "Oh, this is serious, I need a lawyer now"?

6 MS. KUPERSMITH: That's possible, but that doesn't  
7 change the admissibility of his statements prior to that  
8 point because there was that voluntary and knowing waiver of  
9 his rights --

10 THE COURT: And the government, I just want to  
11 confirm -- you are not intending to introduce statements  
12 made after he -- I think even the government concedes --  
13 invoked and asked for a lawyer.

14 MS. KUPERSMITH: Yes, with a caveat that were the  
15 product of police questioning. And any statements that he  
16 made that were not the product of police questioning, the  
17 agents didn't have a reason to just not listen to him or to  
18 tell him to stop talking if they were not bringing up  
19 questions that were creating a response.

20 If he was on his own bringing up questions, the  
21 agents -- all of those statements are admissible, and I  
22 think there is two very clear examples of that in the  
23 transcript where the agents stopped talking to him, he  
24 specifically says, "Hey, can I ask you some questions," and  
25 then makes statements on his own. And because those aren't

1 the product of any interrogation, they're not the result of  
2 his invocation of counsel. It's completely his desire to  
3 talk at that point.

4 THE COURT: What is your response to  
5 Mr. Castillo's argument that these are skilled agents -- and  
6 I am not putting words in Mr. Castillo's mouth -- that they,  
7 sort of, set this up, room being cold, do you want gum, to  
8 try to warm him up to speak again.

9 MS. KUPERSMITH: I don't think the transcript  
10 bears that out. I think the transcript shows there is a  
11 moment in time where the agent says, "Okay, let's pause."  
12 They are talking about getting him a sweatshirt, but there  
13 is nothing that the agent says in that process of getting  
14 him a sweatshirt and kind of explaining that this situation  
15 is still ongoing that brings those statements that  
16 Mr. Harrell makes.

17 And what the transcript shows is there are  
18 statements that are completely outside of anything that the  
19 agents are saying that do not impact Mr. Harrell's voluntary  
20 decision to make some statements to the agents. And the  
21 agents aren't required to just not listen to him at that  
22 point. If he is on his own making statements, it's not the  
23 product of any interrogation.

24 THE COURT: Okay. Thank you, Ms. Kupersmith. I  
25 think that's all the questions that I had.

1           Mr. Castillo, can we jump back now and talk about  
2           your motion to suppress. If you have anything you want to  
3           say in response, I will allow you that opportunity as well,  
4           but I wanted to shift to the motion to suppress evidence  
5           based on the search warrant that was executed at -- I  
6           believe it was Mr. Harrell's parents' home.

7           MR. CASTILLO: Yes. The only thing I would add --

8           THE COURT: Why don't you step to the lectern.

9           MR. CASTILLO: I'm sorry.

10          The thing I would end with to, sort of, address  
11          the government's argument that when he begins to talk and  
12          it's a new discussion, I would say it's not because he is in  
13          the same place, agents are in close proximity. They're  
14          asking him questions.

15          They might give him a little time to think, but  
16          they know what's coming next. They know at some point he is  
17          going to ask something -- "Can I ask you a question?" I  
18          think it's a continuum. I think the Miranda violation is  
19          one that cannot be fixed.

20          THE COURT: Let's shift, if we could, on the  
21          motion to suppress the evidence.

22          I would like to get your synopsis of your argument  
23          and the reason being is that it seems to me law enforcement  
24          got this information that they claim was based on a reliable  
25          tip with a nickname that was linked to Mr. Harrell and also



1 a gamer tag that was linked to Mr. Harrell, and there was  
2 some other sort of identifying characteristics that linked  
3 Mr. Harrell, where he lived, where he worked.

4 It seems to me that all of that in total satisfies  
5 the probable cause standard, but. Tell me what -- I'd like  
6 to get your perspective on it.

7 MR. CASTILLO: Thank you, Your Honor.

8 So the Court is correct. What happened here is  
9 that an individual gets arrested abroad. They identify him  
10 as FS 1, Foreign Subject~1 in the Complaint.

11 We don't know when that individual gets arrested.  
12 All we know is that he is arrested abroad, and he is a  
13 producer, he is someone who is in this realm who works in  
14 this world.

15 He gets arrested at some point, I think before  
16 May 23rd because as best as I can figure based on the  
17 Complaint and the affidavit, May 23rd is when the government  
18 agents began looking for the War Titan.

19 The information they get about the War Titan all  
20 comes from FS 1. And the crux of my argument is that the  
21 agents failed to provide any real information about FS 1.  
22 They didn't really indicate when he was arrested, which I  
23 think would be significant, how long he had been detained,  
24 what charges he had been arrested for, and what incentive he  
25 was given to cooperate, what, sort of, carrot he was

1 promised.

2 THE COURT: Is that -- how is that relevant to the  
3 motion to suppress? One might argue maybe some of that is  
4 relevant if in fact he is going to testify at a trial, but  
5 we're talking about probable cause here.

6 MR. CASTILLO: And I know it's a low standard,  
7 Your Honor, probable cause is certainly not the standard  
8 that would be one that would be placed at a trial -- it's a  
9 lower standard.

10 But I think even with probable cause you have to  
11 have facts that would lead the agents to believe -- here the  
12 informant -- I will call him an informant. They would have  
13 to have information that would make them think that he was  
14 credible and reliable.

15 THE COURT: Could one make the argument that, if  
16 this informant -- we'll just call him that for purposes of  
17 this argument -- says, "Okay, this person lives in this  
18 town, he goes by the gamer tag War Titan," photographs that  
19 the informant has shows an individual working at a theater,  
20 and sure enough they find this person Mr. Harrell works at  
21 the same theater, when you put those together, is that  
22 enough to suggest that at least the information that he has  
23 provided has indicia of reliability?

24 MR. CASTILLO: I think it would, but I think  
25 before you get to that point the agents here -- and there's

1 agents abroad and agents here in Philadelphia and Boston --  
2 they're sort of working together.

3 But I think what needs to have happened is before  
4 the agents in the U.S. accepted the information given by the  
5 agents abroad, they need to know what steps the agents  
6 abroad took to confirm that what FS 1 was telling them was  
7 credible.

8 In other words, they had FS 1 under arrest. They  
9 had his computers. Presumably they had his Xbox console.  
10 They could have examined it and looked at it to see whether  
11 he ever played with the War Titan, whether they ever engaged  
12 in gaming, whether the items in his computer, the seized  
13 evidence corresponded to what he told them about where he  
14 got those items or those digital videos or images, whatever  
15 the case may be.

16 And here it doesn't seem as though they did that.  
17 They just, sort of -- I think some of the documents the  
18 government turned over to me said, "We accepted the  
19 information given to us by FS 1." Well, there needs to be a  
20 test, and our argument is that that test was not met before  
21 they gave the name.

22 Say, for example, the War Titan had nothing to do  
23 with anything. Then the government would just go to  
24 Microsoft or issue a subpoena and get the address for  
25 someone who is completely unrelated to what we're talking

1 about here.

2 THE COURT: All right.

3 MR. CASTILLO: So I think that's what they didn't  
4 do.

5 One thing I would note, Your Honor, is that there  
6 is information in the affidavit about searches that were  
7 conducted by government agents here. And by "here" I mean  
8 in the U.S. They start I think at paragraph -- the Court  
9 has the affidavit, paragraph 27. Actually a little bit  
10 before that, paragraph 25, the Charter Communications  
11 subpoena which we have in discovery. There is also a  
12 mention of a clear check that they did, a public database  
13 check.

14 I say that we accepted these statements as true.  
15 I did ask just yesterday, and I apologize for the lateness,  
16 of the government to provide me with any of the underlying  
17 materials related to that clear check that they did, the  
18 databases search, as well as the DMV search that's mentioned  
19 in the following paragraph where they get vehicles related  
20 to the address. They haven't yet provided that to me, but I  
21 want to let the Court know that that's something that's  
22 pending.

23 But again, assuming those things are true, I would  
24 say that that gets closer to probable cause, but I think the  
25 missing link is that they didn't verify what FS 1 told them

1 before they accepted his words at face value.

2 THE COURT: Thank you.

3 Is it Ms. Kupersmith again, or are you switching  
4 off?

5 All right, Ms. Myers. So it seems like the crux  
6 of the argument is that the government didn't adequately vet  
7 FS 1. Or to the extent it did, it's not documented, and  
8 your response.

9 MS. MYERS: Yes, Your Honor. I think that law  
10 enforcement here relied on the information provided by law  
11 enforcement abroad. There is sufficient indicia of  
12 reliability in the information that was provided.

13 And because it's in the -- because that  
14 information is located abroad, that is not within our  
15 government's custody or control. We are relying on the tip  
16 that was passed to us.

17 The tip was sufficiently reliable because it  
18 involves somebody who is involved in the same type of crime  
19 as Defendant Harrell. He said that he was involved in a  
20 Wickr chat with Soole. We knew that Soole -- law  
21 enforcement already knew that Soole was on the dark web, was  
22 producing child pornography involving multiple victims.

23 Additionally, the tip was that FS 1 plays Xbox  
24 with the War Titan. And so foreign law enforcement looked  
25 at FS 1's devices. They found the Wickr chat. They found

1 photographs sent by Soole to FS 1, and so they're  
2 corroborating the tip abroad because they have the  
3 information from FS 1. They go to his digital devices.  
4 They see information that is corroborating what he has  
5 provided already.

6           Additionally, FS 1 had child pornography produced  
7 by Soole. And so all of that adds to the reliability of the  
8 tip.

9           Additionally, before that Soole had posted online  
10 that he was affiliating with another producer from the  
11 Website. So those two data points correspond.

12           THE COURT: You said Soole had posted online he  
13 was affiliating with another producer. He did not identify  
14 that producer.

15           MS. MYERS: No, he did not.

16           THE COURT: All right. I just want to make sure  
17 I'm clear on that.

18           MS. MYERS: I think the tip has sufficient  
19 reliability. There is no obligation for law enforcement to  
20 uncover every stone connected to FS 1. The information was  
21 provided as a lead.

22           So I think that, if you look at the case which is  
23 Patayan Soriano which we cited in our papers, there the tip  
24 was reliable, and they determined there was a lot less  
25 information in that tip than there was in FS 1's tip.

1           And the Court said, "Look. There was a reason for  
2 him to cooperate and to provide truthful information because  
3 he has been apprehended." And the tip was sufficiently  
4 detailed. Right? We're not talking about somebody who is  
5 arrested for fraud who is giving information about Soole.  
6 It all makes sense.

7           Additionally, even if you take the tip aside, this  
8 case would be analogous to the anonymous tip in Illinois  
9 versus Gates where somebody gave a letter to law  
10 enforcement. It was detailed about the Gates' illegal  
11 activity and their drug trafficking activity. And there  
12 what law enforcement did is exactly what law enforcement did  
13 here, which was to corroborate the tip.

14           So law enforcement takes the War Titan piece of  
15 information, they then connect it to Defendant Harrell. And  
16 then from that connection they conduct additional  
17 investigation about Harrell that allows them to connect it  
18 back to Soole.

19           For example, they found that defendant was living  
20 at a place which was the subject premises which is  
21 registered as a daycare. He works at a Cinemark theater  
22 which is the same type of photographic evidence that he has  
23 provided to FS 1.

24           Additionally, the child that is on his father's  
25 Facebook page is the same child that is in Soole's

1 pornography, child pornography. That's a very strong link  
2 connecting the defendant to Soole.

3 And so I think that under Patayan Soriano and  
4 Illinois versus Gates, law enforcement had an abundant  
5 probable cause, they corroborated the tip, the tip was  
6 reliable, and they presented those facts to United States  
7 Magistrate Judge Chooljian who determined that there was  
8 probable cause.

9 So I think on those points there was nothing else  
10 that law enforcement needed to do in connection with the  
11 FS 1 tip.

12 However, at Mr. Castillo's request, we did go back  
13 to foreign law enforcement -- and this connects back to the  
14 Franks hearing component of defendant's motion -- to  
15 determine whether some of the facts that Mr. Castillo wanted  
16 to know about FS 1 were available to us.

17 And the information is contained in Exhibit E  
18 which is attached to defendant's motion which is the  
19 government's letter in response to defendant's discovery  
20 request.

21 And there it identifies that law enforcement did  
22 find FS 1's tip to be reliable because he had allowed them  
23 to find, identify, and arrest other producers of child  
24 pornography. He had no criminal history including no  
25 arrests for dishonesty or deceit, which increases the



1 reliability of his information. He had no difficulties with  
2 alcohol or narcotics.

3 And so I think, if those facts had been available  
4 at the time and had been added to the affidavit, it would  
5 have increased the probable cause, not decrease it. And,  
6 therefore, there is no reason for the Court to grant  
7 defendant's motion. There is no reason for the Court to set  
8 aside Magistrate Judge Chooljian's finding of probable  
9 cause, and there is no basis for a Franks hearing,  
10 Your Honor.

11 THE COURT: Thank you, Ms. Myers.

12 Mr. Castillo, I will allow you an opportunity to  
13 respond as it relates to this motion, and then I want to  
14 talk about the last motion as relates to your client, and  
15 that's the motion to sever.

16 MR. CASTILLO: Thank you, Your Honor.

17 Well, Your Honor, I guess it just goes back to the  
18 argument that linking the War Titan to Soole is what the  
19 government wants the Court to accept, that all the steps  
20 were taken to do that.

21 And I think the biggest thing is we need to --  
22 what they needed to do was to figure out, sort of, the  
23 reason why this FS 1 was providing this information, whether  
24 it was for self-gain or some kind of benefit that was  
25 promised to him.

1 I think that would be relevant. We don't have a  
2 record that supports that here. The government says,  
3 "Nothing was promised, he just provided the information, and  
4 we followed the lead."

5 But I think it is significant for the Court to  
6 look at a person's motivation, what relationship that person  
7 had with Mr. Harrell, and why he said what he did.

8 THE COURT: Would your argument be any different  
9 if, let's say, instead of identifying this individual as  
10 FS 1, it was just an anonymous tip?

11 MR. CASTILLO: I think it would be -- I think the  
12 argument would still be the same. I think we still need to  
13 know what the basis is for that person's knowledge and what  
14 their motivation, what their gain is, what they're promised.  
15 People don't just speak out against others, I don't think,  
16 without a reason, and here we don't know what that reason  
17 was.

18 THE COURT: All right. And the last motion is the  
19 motion to sever, Mr. Castillo.

20 So I would like to hear your thoughts relative to  
21 that. I will be candid with you. I think it's a little bit  
22 of an uphill climb for you as relates to that in particular  
23 because it strikes me, just based on the charging documents,  
24 they're charged as co-conspirators. I mean, you know, we  
25 all know that the burden is pretty high, but I want to give

1 you an opportunity to be heard.

2 MR. CASTILLO: Thank you, Your Honor.

3 So I guess the reason for the motion to sever, the  
4 Court knows that this -- the conduct here is pretty  
5 egregious. I don't think anyone would minimize it or say  
6 that it's not something that is serious and impactful and  
7 will draw people's emotions in.

8 And I think that having Mr. Harrell joined with  
9 Mr. Brinson and the others and having the government present  
10 all of this evidence that will be overwhelming and it will  
11 take time and they'll produce victim after victim, I think  
12 the impact of particularly of defendant's statements -- and  
13 here it goes in pretty much every direction because  
14 Mr. Harrell makes statements that implicated Mr. Brinson,  
15 Mr. Brinson made statements that implicated Mr. Harrell,  
16 Mr. Lawniczak made statements that implicated Mr. Brinson,  
17 and vice versa. And Mr. Martinez who is not here also made  
18 statements.

19 The impact I think of having -- and I think the  
20 only -- I put this in my motion. I think the only charge  
21 that has the, sort of, umbrella charge is the first count, I  
22 believe.

23 THE COURT: But that's a significant count. It's  
24 alleging an enterprise involving all of these defendants.  
25 And so wrong or right, the Court is struggling with the

1 notion that you have this charge. It envisions charging  
2 multiple individuals, and it's hard for the Court to say,  
3 "Oh, but we should sever this simply" -- look. It strikes  
4 me that the argument by and large is that, look. There is a  
5 significant amount of evidence here. Given the nature of  
6 the charges, it may inflame the jury, and that's going to  
7 have a negative consequence.

8 I'm not trying to minimize that. It would be one  
9 thing if it was just three or four individuals charged with  
10 producing child pornography. But the charge is engaging in  
11 a child exploitation enterprise.

12 The government has the burden of proving that. If  
13 they believe they can prove that, I struggle with why the  
14 Court should sever Mr. Harrell based on that.

15 MR. CASTILLO: I guess the only thought is  
16 flipping that. If that's the case, the Court can just have  
17 a trial in Count 1 with all defendants and then separate all  
18 the other counts against each other with respect to each  
19 defendant.

20 I know that will take time, and it will, sort of,  
21 be something -- a burden on the government, but I think the  
22 rights of the defendants here are pretty significant.

23 THE COURT: Okay. Ms. Kupersmith. You are going  
24 back and forth here I see.

25 I am curious your response to Mr. Castillo's

1 suggestion let's do a trial on just Count 1 as relates to  
2 all defendants, and, as relates to the remaining counts,  
3 those get severed and we try this three or four other times.

4 MS. KUPERSMITH: I think in terms of judicial  
5 resources, Your Honor, that is not an efficient use of it.  
6 I don't think that's anything supported by the case law.

7 The defendant must show that there is -- that the  
8 denial of severance of proceeding with a joint trial is some  
9 violation of substantive right. Even if we didn't have the  
10 Count 1, there is significant overlap in the other charges  
11 that exists in terms of the evidence that would be presented  
12 against the different defendants, and the standard is just  
13 not let's try and separate it for the hopes that it makes it  
14 better for everyone.

15 There -- in this case the disparity of volume of  
16 evidence is certainly not a ground for severance --

17 THE COURT: Ms. Kupersmith, do me a favor. From  
18 one fast talker to another, our court reporter's fingers are  
19 going to fall off at this pace. If you can slow down,  
20 please.

21 MS. KUPERSMITH: Your Honor, there is just no  
22 support for why that that should be the solution. Even if  
23 we take outside the context of Count 1, there is a lot of  
24 overlap in the different production counts. The Count 17  
25 which is the obtaining custody for the purpose of creating

1 child pornography relates significantly to Count 18 for  
2 Defendant Lawniczak of the sex trafficking charge.

3 Even for the production counts themselves, there  
4 is a lot of evidence that would be related to each other.  
5 Both Defendant Harrell and Defendant Brinson abused some of  
6 the same children, also abused some of the same children  
7 together.

8 So that evidence would still be presented. And to  
9 separate those trials doesn't make a lot of sense for  
10 judicial resources purposes, but it also doesn't make any  
11 sense because there is no denial of substantive rights by  
12 joining those counts.

13 And I would point the Court to DeRosa which is a  
14 Ninth Circuit case which found that the jury could fairly  
15 evaluate the evidence in light of careful limiting  
16 instructions even when the count that formed the basis for  
17 joinder was dismissed.

18 So even if we had Count 1 proceed in a separate  
19 charge I think the government would still be moving for  
20 joinder properly because of all of the overlapping evidence  
21 in this case.

22 THE COURT: I am assuming you all have done this  
23 much more than I ever did. What would you envision would be  
24 a limiting instruction? The standard consider each count as  
25 to each defendant, you are supposed to consider the evidence

1 as it relates to each defendant and decide on each defendant  
2 separately? Or would there be something more tailored to  
3 this case?

4 MS. KUPERSMITH: Your Honor, I have not given  
5 thought to exactly what that limiting instruction would be.  
6 However, as Your Honor points out, this charge in particular  
7 envisions multiple defendants. And so I am sure there are  
8 examples of other Courts for specifically the enterprise  
9 charge as well as production charges that we could go back  
10 and craft.

11 I would imagine some of it is going to depend on  
12 how the evidence comes in, which specific defendants end up  
13 going to trial, whether or not there are any of the  
14 co-defendants who testify.

15 And so the limiting instruction would likely be a  
16 little bit more tailored than just a general one, but I have  
17 no doubt that between the parties and the Court we would be  
18 able to craft something that sufficiently addresses those  
19 issues.

20 THE COURT: Thank you, Counsel. I appreciate it.

21 Mr. Castillo, anything further as it relates to  
22 this motion, the motion to sever?

23 MR. CASTILLO: No. Submitted.

24 THE COURT: Let's, if we could, shift over to  
25 Mr. Brinson. He has two motions, Mr. Brinson does. So

1 let's start with the motion to suppress the statements.

2 MR. NICOLAYSEN: Your Honor, good morning.

3 Greg Nicolaysen for Mr. Brinson.

4 I would ask the Court's permission to play about  
5 one minute of the videotaped post-arrest interview which  
6 contains what I contend is a valid invocation of the right  
7 to counsel, and then I am just now trying to be clear on how  
8 the ELMO may be used because there are photos.

9 THE COURT: Is the ELMO -- is the drawer open?  
10 Okay.

11 MR. NICOLAYSEN: I think we are there.

12 If the Court please, I am going to begin by  
13 putting the excerpt of the post-arrest interview of  
14 Mr. Brinson. The statements at issue begins just after  
15 Minute 27. And I should put this into context. This is a  
16 5 1/2 hour interview.

17 I strike my own word "interview" -- interrogation.

18 And when I ask Your Honor to seriously consider  
19 the legitimacy of this invocation of counsel, it's so  
20 important to know it's at the outset. It's not halfway  
21 through or towards the end. It's at the very beginning.

22 Unlike Mr. Harrell where the government says,  
23 "Well, we will stipulate not to use statements after a  
24 certain point," that tactical option is not available to the  
25 government here because Mr. Brinson -- and I will note this



1 in a moment. My papers discuss it at length -- remained  
2 absolutely quiet for the first hour. It was the most  
3 agonizing thing to watch.

4 And I ask Your Honor for permission -- I will just  
5 put a few photos. They're exhibits to the motion -- to  
6 depict at minute 27 at the very beginning of the 5 1/2 hours  
7 we have this.

8 Let's see if the audio -- I'm hoping the audio.

9 (Exhibit played.)

10 MR. NICOLAYSEN: This is 26 minutes and 22  
11 seconds, do you see the quiet? This is indicative of the  
12 agents pushing.

13 (Exhibit played.)

14 MR. NICOLAYSEN: That's the agent assuming it. My  
15 client hasn't said anything.

16 (Exhibit played.)

17 MR. NICOLAYSEN: "Basic stuff." Make it sound  
18 benign.

19 (Exhibit played.)

20 MR. NICOLAYSEN: And that speaks volumes.

21 THE COURT: Let me hear you --

22 MR. NICOLAYSEN: The interrogation should have  
23 stopped at that point --

24 THE COURT: You are saying that the statement,  
25 "You said I could have an attorney," equates to an

1 invocation of, "I want an attorney."

2 MR. NICOLAYSEN: It absolutely is. And one of the  
3 concerns that I have is the way the government has opposed  
4 this motion. The government's approach is to be hyper  
5 literal in expecting that a member of our society, anybody  
6 here questioned by police, should be so exact and so precise  
7 as to say, "I want an attorney," whereas to say, "You said I  
8 could have an attorney," sorry. That doesn't rise to that  
9 level. You are out of luck.

10 That distinction is artificial and nothing but a  
11 tactic by the government to preserve this post-arrest  
12 interview interrogation because they want to use it at  
13 trial.

14 These are artificial distinctions. And I should  
15 emphasize my client has no criminal history. He has a  
16 little skirmish as a juvenile that was dismissed. This is  
17 not someone who has any background with engagements or  
18 encounters with law enforcement.

19 Your Honor, myself, my colleagues on the panel, we  
20 deal with gang members who are in their mid, late 20s, and  
21 by that stage in their life they've dealt with cops so  
22 frequently they have no hesitation to say, "I want a  
23 lawyer," and they do say that many times because they have  
24 juvenile records. They have been in and out of CYA.

25 We have to be respectful of what it means for a

1 member of our society with no background who was arrested on  
2 a case of this type being challenged by -- confronted by  
3 seasoned agents who know -- they're trained at the academy.  
4 They know how to do this -- who will not let this guy go.

5 And my client's a minority. It's worth noting.  
6 There are anxieties when you are black. You get  
7 particularly scared when you are sitting in an interrogation  
8 room with cops.

9 So what do we expect of Mr. Brinson under the  
10 Fifth Amendment? What is the real expectation under the law  
11 when Mr. Brinson says so early in the 5 1/2 hours, "You said  
12 I could have an attorney present." That's enough.

13 THE COURT: Let me stop you for a second. Look.  
14 When I watched the video, you know, Mr. Brinson, he's not an  
15 idiot. He is a pretty sophisticated, intelligent human  
16 being.

17 Are you suggesting that the environment that he  
18 was placed in put him in a scenario where at the time he  
19 said, "You said I could have an attorney," that what he  
20 meant was, "I want to have an attorney," even though later  
21 on he talks, he asks questions, he talks about a whole host  
22 of other things with a level of knowledge, sophistication?  
23 And quite frankly again I go back to -- he seems like a  
24 smart person who knows the gig is up and now it's time to --  
25 I don't know what the right word is. Now it's time to just

1 tell it like it is.

2 MR. NICOLAYSEN: Sophistication is a relative  
3 concept. People can be sophisticated in some context but  
4 not in others. I am not saying he is not sophisticated in  
5 certain aspects of everyday life.

6 But this is not someone who has a history of  
7 encounters with law enforcement. We all know the nature of  
8 the charges in this case. This is not shoplifting.

9 So when he's been arrested and he's in that  
10 windowless interrogation room with trained agents who are  
11 not letting him go -- and I am going to put on the ELMO a  
12 few of the photos -- they have no intention of honoring his  
13 request for a lawyer.

14 His sophistication of the outside community and  
15 everyday life and the job that he may have does not  
16 translate legally into sophistication for purposes of being  
17 able to articulate with a high level of technical precision  
18 a request for an attorney.

19 We have to understand the anxieties, the fears,  
20 the lack of experience with cops, the training of these  
21 cops. And when we look at the 5 1/2 hours, those agents had  
22 no intention of honoring a request for an attorney.

23 When we see how the agents redirect the  
24 interrogation, which my papers briefed in detail with quotes  
25 and excerpts from the interview, interrogation, it's all

1 about redirecting. It's all about instilling in  
2 Mr. Brinson -- again, as I argue in my papers, the dilemma  
3 that if you, Brinson, want an attorney, you are going to  
4 lose strategically. You are going to lose an opportunity  
5 that we're giving you right now to cooperate. That kind of  
6 tactical dilemma completely undermines the constitutional  
7 right to an attorney.

8           The agents had no business intimidating a suspect  
9 especially one with no background with the police into  
10 thinking, boy, my constitutional right, I am going to get --  
11 excuse my language -- I am going to get screwed if I use my  
12 constitutional right to a lawyer because the agent's telling  
13 me it's now or never. This is it. This is your one and  
14 only chance to help yourself.

15           That's the kind of manipulation that the courts in  
16 Rodriguez and Henry which I discussed at length rejected as  
17 a type of tactical manipulation that is unacceptable.

18           THE COURT: Is it your position that the tactical  
19 manipulation -- well, let me rephrase that.

20           You talk at length about the agent's experience,  
21 the fact that they kept him in the room for five hours.  
22 Agents have experience. They are trained to  
23 interview/interrogate individuals, and those interviews can  
24 take time.

25           Are you suggesting that there should have been a

1 time cap on this and that they should not have used the  
2 techniques that they have been trained in to try to get  
3 Mr. Brinson to talk? Is that it?

4 MR. NICOLAYSEN: We all know that these are fluid  
5 procedures. There is no hard-and-fast rule. We know that.  
6 There is no such thing as a 60-minute limit. If you don't  
7 get what you want in 60 minutes, agents, you are done.

8 We all understand this is not a black-and-white  
9 process. It's very subjective. It has to be specific to  
10 the defendant and the circumstances of that interview.

11 But here, when a defendant invokes his request,  
12 "You said I could have an attorney," at Minute 27 of a  
13 5 1/2-hour interrogation, and you look at the interrogation  
14 as I have briefed at length and you see how the agents just  
15 essentially blow him off -- that's really what they're  
16 doing -- and they redirect the conversation to the substance  
17 of the investigation, they're not honoring anything to do  
18 with getting an attorney, and, in fact, convey very clearly  
19 the downside to him, "If you get a lawyer, you are going to  
20 lose. You are going to lose big."

21 And they say at the end -- and I argued this in my  
22 papers -- at the very end they give it very clearly. "If  
23 you had asked for an attorney, you wouldn't have been able  
24 to cooperate the way you did," as if he really helped  
25 himself.

1           We're here to suppress statements the government  
2           is going to be using against him at a trial, but all those  
3           five hours the agent was -- the two agents were conveying,  
4           "If you don't invoke a lawyer and you speak to us, you are  
5           going to help yourself. You are cooperating." It's  
6           complete manipulation.

7           Your Honor asked can they use tactics. Of course  
8           they can use tactics, but it's a question of degree. And  
9           here the degree was so overbearing. And what we cannot  
10          forget is that first 60 minutes. I just want to -- I don't  
11          know --

12          THE COURT: Before you get there, I come back to,  
13          "You said I could have an attorney present." I thought the  
14          agent says in response to that, "Yeah, you can have one if  
15          you want, and, if there is something you don't want to  
16          cover, we'll stop the interview."

17          Again, I struggle with how that statement is  
18          somehow an invocation of, "I want an attorney." And again  
19          with someone who appears in the video to be intelligent and  
20          sophisticated. And I get it maybe not in the,  
21          quote/unquote, criminal realm, but when someone says, "If  
22          there is something you don't want to cover this interview  
23          could stop," I would think Mr. Brinson would say, "Okay.  
24          That's it. I'm done. I want the attorney."

25          MR. NICOLAYSEN: We are asking too much of members

1 of the public. Sometimes we as lawyers, judges perhaps, we  
2 live in an intellectual vacuum in a sense. We don't  
3 actually ourselves undergo these interrogations. We  
4 litigate them in the courtrooms. So we have a tendency to  
5 discuss them a little too abstractly. I think we have to be  
6 careful about that approach because what we see is the  
7 dynamics of what is going on.

8           The photo here on the screen is an exhibit to the  
9 motion. It's just one example of -- and this is 50 minutes,  
10 twice the time since he said, "You said I could have a  
11 lawyer."

12           And we have here another picture. Look at the  
13 agonizing -- it doesn't matter if the agents are now at a  
14 later point in the interview saying, "If there is something  
15 you don't want to cover" because by then the agents have  
16 already been pushing him and pushing him, and they  
17 disregarded his statement, "You said I could have a lawyer."

18           And when we see in the video -- these are  
19 screenshots from the video, and these are just very few  
20 examples. The video was replete with this in the first 60  
21 minutes.

22           Mr. Brinson not talking, not saying anything,  
23 displaying a level of true agony, really it's agony. And  
24 the papers point out that at a certain point he wants to  
25 vomit, wants to go to the bathroom. They give him a bucket.



1 They take him at one point. He is in complete physical  
2 deterioration.

3 It's just -- this next photo is such a glaring  
4 illustration of what he is going through.

5 How can that person be criticized for not, once  
6 again, stopping the interview because he is, apparently,  
7 sophisticated?

8 I ask Your Honor to differentiate between the  
9 levels of sophistication and self-control that we can  
10 exercise in our everyday life with our families with our  
11 colleagues and strangers versus what happens in that  
12 interrogation room. Look at that picture, and that's just  
13 halfway through the hour.

14 THE COURT: Mr. Nicolaysen, one could make the  
15 argument those pictures aren't evidence of some physical  
16 deterioration. It's evidence of -- all right. My back is  
17 up against the wall, and there is no way out for me now.

18 MR. NICOLAYSEN: Well, this is -- the one we have  
19 on the screen here also an exhibit to the motion, this is  
20 where we're talking about a person now who has expressed the  
21 need to vomit.

22 And when you are at that point, you are in such a  
23 confused mental state that you can no longer be asked to  
24 rationally say, "I want to, once again, invoke my right to  
25 an attorney."

1           The government is being much too literal, much too  
2 technical in holding Mr. Brinson to a standard of precision  
3 in regard to his invocation of an attorney.

4           And the cases we cite point out very clearly that  
5 tactics that create confusion mixed together with the  
6 repeated and prolonged nature of the questioning are  
7 relevant factors in the Fifth Amendment analysis. That's  
8 our motion at page 30 --

9           THE COURT: If I could stop you.

10          MR. NICOLAYSEN: Of course, Your Honor.

11          THE COURT: Tell me what you believe are the,  
12 quote/unquote, tactics that created confusion.

13          MR. NICOLAYSEN: There is no one answer to that.  
14 The motion -- and I am sorry. I'm not trying to avoid the  
15 question, but our motion has long excerpts from the  
16 videotape that show the repeated pattern of wanting him to  
17 go back to that -- the substance on the -- people are in the  
18 courtroom. I won't use the term. It's under seal, but it's  
19 the subject of the investigation.

20          And the agents use terminology that trivialized  
21 the severity of the discussion treating it almost like a  
22 conversation. We saw it when I played the excerpt. They  
23 want to talk about basic stuff, quote/unquote. There is  
24 nothing basic about it. This is an attempt to have him  
25 completely incriminate himself and, basically, plead guilty

1 in the middle of an interview.

2 So the agents are clearly manipulating  
3 Mr. Brinson's ability to appreciate the severity of this  
4 interrogation, and it's the persistence. And in answer to  
5 your question, I ask the Court go back and seal the excerpts  
6 because we have a lot of footnotes --

7 THE COURT: I have spent a lot of time going --

8 MR. NICOLAYSEN: I thank the Court very much, a  
9 lot of footnotes in the motion to specific calibrated points  
10 during the interrogation that show the agent's -- what I  
11 call the unrelenting persistence. They will not let him go.

12 So I argue -- I know the government doesn't agree,  
13 but the Henry case that we discussed primarily on pages 33  
14 and 34 I think is very applicable here where the agents are  
15 using very similar tactics -- the Henry opinion says  
16 slippery and illegal tactics, but what we have is right  
17 after invoking the right to an attorney, which is, of  
18 course, my characterization, but I think it's the right one,  
19 my client sat silently, doesn't say a word, and the agents  
20 just sit there with him for more than five minutes of total  
21 silence and the agents say, quote, "Nothing surprises us,  
22 John. This isn't the kind of thing you can talk about with  
23 buddies down at the bar."

24 It's just lulling him into this false sense of  
25 security, wanting Brinson to be comfortable, not allowing

1 Brinson to understand that he is about -- that the agents  
2 want him to completely open up and incriminate himself,  
3 plead guilty.

4 The agents just ignored the statement that I  
5 played -- "You said I could have an attorney." And within  
6 the next five minutes, "When did you first find" -- blank --

7 THE COURT: Mr. Nicolaysen, could I stop you for a  
8 second?

9 MR. NICOLAYSEN: Sure.

10 THE COURT: You say that the agents ignored the  
11 request.

12 MR. NICOLAYSEN: They completely ignored it.

13 THE COURT: Is that a fair characterization when I  
14 thought the colloquy was, "You said I could have an attorney  
15 present," and the agents respond by saying, "You could have  
16 an attorney if you wanted, and if there is something you  
17 didn't want to cover, we'll stop."

18 That's not ignoring it. I assume the government  
19 is going to say that's just answering the question; right?  
20 Or I'm not going to say "right."

21 MR. NICOLAYSEN: The government does say that.  
22 The government takes what I call a hyper literal approach.  
23 The government's position is you have to be unequivocal and  
24 absolutely precise and say, "I want an attorney present.  
25 I'm not going to talk to you without an attorney."

1           There are people in our society who are capable of  
2 saying that. I have clients who have that, as Your Honor  
3 uses the term, "sophistication."

4           But we must not allow that expectation to become a  
5 general rule applicable to our entire society because people  
6 like my client with no history of encounters with law  
7 enforcement who is clearly undergoing severe stress is not  
8 going to speak at that level of precision.

9           He's also a minority. There is a unique anxiety.  
10 It's different than if I am talking to police officers.  
11 There are cultural factors that have to be weighed in the  
12 mix here.

13           So my client, if we want to talk in a way  
14 favorable to the government, maybe he was a little indirect.  
15 I don't agree with that, but let's just say for the sake of  
16 argument he was a little indirect. The agents should have  
17 stopped and said not -- "You can have an attorney if you  
18 want" because that use of English once again puts the burden  
19 back on Brinson -- and instead say, "Would you like an  
20 attorney? If you would like one, we'll arrange -- we'll  
21 stop the questioning now." That would be more consistent  
22 with the legal standard.

23           But instead look at the communicational style of  
24 the agent. "You can have an attorney if you want," and then  
25 goes on and continues to ask questions about the substance

1 of the investigation, putting that burden back on  
2 Mr. Brinson when it's clear that there was some hesitation  
3 in Mr. Brinson, very understandable when he says, "You said  
4 I could have an attorney."

5 This guy is terrified, and the law must respect  
6 that and not allow the agents to come back with a style of  
7 speaking that simply puts the burden right back on the  
8 suspect. That to me is exactly what Henry and Rodriguez was  
9 talking about those, quote/unquote, slippery and illegal  
10 tactics.

11 THE COURT: I am curious as to your response --  
12 the government talks about, well, look. Government takes a  
13 different view, obviously, but then they refer to letters  
14 that were written by your client.

15 MR. NICOLAYSEN: Sure. Let's talk about that.

16 THE COURT: I would like to get your analysis of  
17 what those -- A, should the Court consider those letters; B,  
18 to the extent the Court considers those letters, where does  
19 that tip -- where does that move the discussion in the  
20 analysis?

21 MR. NICOLAYSEN: Right. I am surprised the  
22 government obtained them, had included them, and I don't see  
23 a foundation being presented to this Court that justifies  
24 the utilization of those letters. I think that remains a  
25 questionable legality.

1 THE COURT: Even though -- again, I recognize your  
2 client is not sophisticated. I think it's pretty clear in  
3 virtually every prison, particularly federal prison, phone  
4 calls that you make are recorded, communications you make  
5 can be seized and reviewed. You may be -- I'm surprised to  
6 hear you say you are surprised given your experience.

7 MR. NICOLAYSEN: Well, it is an interception that  
8 does surprise me for purposes of being used offensively in  
9 litigation. Your Honor is absolutely right. Inmates don't  
10 have rights of privacy in those regards, but those are  
11 prison management issues. Those are internal security  
12 issues. They're not related to litigation, and that's why I  
13 expressed surprise.

14 But be that as it may, let's talk about how the  
15 government asks Your Honor to consider the content of the  
16 letters.

17 There is a word that the government thinks is of  
18 great relevance in rebutting the invocation of counsel, and  
19 that's the word "compelled." Yes, Your Honor is very aware  
20 of it.

21 So the gist of it is I, Mr. Brinson, felt  
22 compelled as if somehow that is indicative of being  
23 voluntary. I submit to this Court the word "compelled" is  
24 synonymous with coerced, and why wouldn't it be? Once again  
25 for all the reasons stated in the motion and here today

1 Mr. Brinson was in a huge state of both anxiety and under  
2 the control of agents who literally wouldn't take no for an  
3 answer.

4 And we cannot forget that any type of  
5 self-incriminating statement was not made until after the  
6 one-hour point.

7 That first hour is characterized by what we see in  
8 these photos. We could spend the whole morning -- photo  
9 after photo he is just moving and twitching and putting his  
10 hands on his face and his head down on the table not knowing  
11 what to do, and the agents just sit there calmly as they are  
12 trained to do and keep asking him questions about the  
13 substance of it.

14 So now we have a letter written while he was in  
15 custody, and he says, "I felt compelled." Why should  
16 "compel" seem to suggest voluntary?

17 He felt coerced. That's the interpretation. So  
18 the irony being I thank the government for submitting the  
19 letter even though I don't think it's an appropriate use of  
20 a prison interception. Who cares? It's an honest  
21 statement, "I felt compelled." He did feel compelled.

22 THE COURT: You are saying compelled --

23 MR. NICOLAYSEN: Is coerced. It absolutely is.  
24 "I felt compelled." Compelled. Again, when we use terms,  
25 we have to differentiate between their common parlance in



1 outside society where you and I may feel compelled to act a  
2 certain way out of ethics or morals or social virtue -- I am  
3 compelled, I am motivated because that's how the government  
4 would interpret it.

5 I am compelled to do certain things for my kids  
6 because I am a good parent. We are compelled in good ways,  
7 and it's all voluntary.

8 It doesn't mean that here, and it is pure  
9 speculation for the government to suggest that it does.  
10 Compelled, he's felt coerced that he had no choice. There  
11 is nothing else in the letters to put that word "compelled"  
12 into any other context than to say it means coerced.

13 So "compelled" could be motivated in the good  
14 sense in the outside world. But in this context, it means  
15 what I am suggesting to Your Honor. He felt absolutely  
16 overwhelmed by that experience with the agents.

17 He doesn't self-incriminate until after an entire  
18 hour, and the interview is 5 1/2.

19 I think this interrogation does track Rodriguez  
20 and Henry. The government tries to differentiate, but what  
21 we must remember when we cut to the chase and look closely  
22 at the government's opposition, it's all about trivializing.  
23 It's about being dismissive, and that's simply wrong.

24 An entire 60 minutes of agonizing, and there is a  
25 physical deterioration, Minute Number 27, "You said I could

1 have an attorney."

2 This is the type of tactical manipulation the  
3 courts have rejected. So I do ask the Court to suppress all  
4 of his statements because they begin after the one-hour  
5 point as I say.

6 THE COURT: Thank you, Mr. Nicolaysen.

7 Who wishes to respond? Ms. Kupersmith.

8 MS. KUPERSMITH: Yes, Your Honor.

9 THE COURT: Is the government being overly literal  
10 and technical in its analysis? "You say I could have an  
11 attorney," question mark.

12 MS. KUPERSMITH: Your Honor, I appreciate that  
13 defense counsel believes this is some new-found government  
14 strategy, but I would submit it is actually completely based  
15 on case law precedent.

16 Specifically in Davis the question was maybe I  
17 should talk to a lawyer. Pretty remarkably similar to this  
18 case, and the Supreme Court held there is no extra layer of  
19 prophylactics to prevent police questioning when the suspect  
20 might want a lawyer. Unless the suspect actually requests  
21 an attorney, questioning may continue.

22 THE COURT: The invocation must be equivocal from  
23 the government's standpoint.

24 MS. KUPERSMITH: Yes, Your Honor. And I think in  
25 this case it is perfectly clear that he is read his rights,

1 he confirms one of those rights, the agents then respond  
2 with -- confirmed that, if he wanted an attorney he could  
3 have one, that he could stop them from talking, that he  
4 could dictate what topics are covered, and he could dictate  
5 the direction of the conversation.

6           There is no later request for an attorney. The  
7 only time an attorney then comes up again is at the very end  
8 of the interview which is brought up by Mr. Brinson himself,  
9 not by the agents, where he says, "So if I would have asked  
10 for an attorney before answering any of your questions."  
11 Pretty clear from Mr. Brinson's standpoint that he did not  
12 ask for one because he is confirming, "So if I had asked for  
13 one, would this have gone differently?"

14           The agents' response to his statement is  
15 completely appropriate. They are confirming what he is  
16 confirming, that one of those rights -- and they are  
17 acknowledging the fact that he can dictate the direction of  
18 the conversation. He doesn't attempt to do that later.

19           And, Your Honor, I would also like to spend some  
20 time -- there is a lot of attention about that first hour  
21 and that first hour about how he was silent until he was  
22 overborne.

23           And I think if you look at the video and the  
24 transcript of what happened, that is completely false from  
25 what happened in that first hour.

1           The first 14 minutes of that hour he was alone in  
2     the room. So there is certainly nothing that can be read  
3     into his silence.

4           From Minutes 14 through 20, he was completely  
5     engaged with the agents answering biographical questions  
6     that included a lot of information that required coherence.  
7     He was asked about numbers. He was asked about addresses.  
8     He was asked about phone numbers, and he had zero hesitation  
9     of his ability to answer those questions.

10          And then from Minutes 40 to 60, he is asking  
11     questions of the agents. He is not sitting there silently.  
12     He is engaging. He is trying to determine what it is the  
13     agents already know. So at most he was silent for 20  
14     minutes --

15          THE COURT: But Mr. Nicolaysen will argue this was  
16     all part and parcel of the tactic that law enforcement was  
17     using to stretch this out, you know, in the -- my old job at  
18     LAPD they used to say, time, talk, and tear gas in the case  
19     of a barricaded suspect. Just take our time, talk with him,  
20     and over time they'll break down and give us what we want.

21          MS. KUPERSMITH: I think, Your Honor, the video  
22     shows that the agents were extremely patient, they were  
23     extremely calm, and they were giving Mr. Brinson the  
24     opportunity to decide whether or not he wanted to  
25     participate in the interview.

1           The way Mr. Nicolaysen makes it out is the agents  
2 would have been left with no option. If they were  
3 constantly pounding on him to make statements and telling  
4 him repeatedly rather than giving him moments of silence, I  
5 am sure we would have heard that argument as well.

6           The way the defense is presenting this is that no  
7 one who has ever been arrested before could make statements,  
8 no one who was a minority could ever make statements, no one  
9 who doesn't have any guilt or anxiety about what they've  
10 done could ever make statements, no one who is stressed  
11 about being caught after knowing what they've done and  
12 specifically knowing that the agents know what they have  
13 done could never make statements.

14           THE COURT: What's your response to -- you heard  
15 Mr. Nicolaysen talk about and show the photos that he would  
16 argue are, sort of, the agonizing photos -- there is a  
17 physical deterioration that's going on and that demonstrates  
18 the tactic -- that supports the tactic that the law  
19 enforcement was using to try to, for lack of a better term,  
20 break him and make him talk.

21           MS. KUPERSMITH: I would argue, Your Honor, that a  
22 lot of what we're seeing, the physical symptoms there are  
23 self-imposed. They are not the result of any government  
24 coercion. They were result of -- and even Mr. Brinson in  
25 his letter support this, the fact that he -- there is a lot

1 made about the word "compelled."

2 But there is a big difference between  
3 self-imposed, feeling compelled by the presentation of  
4 evidence against you, and government coercion forcing  
5 statements.

6 THE COURT: Right. But in fairness, it is  
7 interesting. Look. The government is doing what it thinks  
8 it needs to do.

9 The letter, in some ways doesn't move -- one might  
10 argue doesn't move the needle at all because Mr. Nicolaysen  
11 raises a valid point. "Compelled," what does that really  
12 mean?

13 You could argue he felt forced to do it. And  
14 maybe he felt forced to do it because the jig was up or  
15 maybe he felt forced to do it because of law enforcement.

16 But my point in saying this is that the letter,  
17 one might argue -- well, I guess I wonder whether how much  
18 weight to give to that letter at all given the other  
19 evidence that's in play.

20 MS. KUPERSMITH: That's fine, Your Honor. Even  
21 without the letters I think the government meets its burden  
22 that this motion should be denied based on just the case law  
23 itself that talks about the levels of what is seen in these  
24 videos compared to what Ninth Circuit and Supreme Court have  
25 already evaluated in terms of a defendant's sickness or a

1 defendant's will being overborne. Even without the letters  
2 he doesn't rise to those circumstances.

3 THE COURT: Couldn't an argument be made that the  
4 time in that room, the five -- some close to five hours,  
5 lends itself to allowing someone's will to be overborne?

6 MS. KUPERSMITH: I don't think that's what the  
7 case law supports. I mean, you have the Thompkins case from  
8 the Supreme Court which held the defendant implicitly waived  
9 his right to remain silent by participating in an interview  
10 when he was silent for two hours, 45 minutes before talking.

11 Here we're talking about maybe 20 minutes. I  
12 think the length of the interview, the agent's tactics that  
13 are completely visible show a patient -- show offered  
14 breaks, offered water. He wasn't physically constrained in  
15 any way.

16 There is a point -- I believe it's on the third  
17 segment of the video where he is left in the room alone and  
18 he is walking around. He is not showing any signs of  
19 physical illness.

20 He makes that one comment of feeling like he is  
21 going to vomit. He is not physically constrained. He can  
22 completely get up. He is offered bathroom break. He is  
23 offered water multiple times. He is offered other drinks.  
24 It just doesn't rise to the level of what the case law is  
25 showing.

1           There is cases that we cite in there about a  
2 heroin addict going through withdrawal, and that's not found  
3 to be that his will is overborne. There is international  
4 flights after being not sleeping and their will is not  
5 overborne.

6           In this case he is brought in, he is able to  
7 coherently answer questions, and it is not until after the  
8 presentation of the evidence against him where he is  
9 deciding to give back to the agents.

10          And I think the narrative that's played out in the  
11 videos and the -- if the Court is going to read anything  
12 into the letters, we just say that it supports what we see  
13 in the videos as a completely different reality than what  
14 the arguments defense counsel is making through their motion  
15 and through the affidavit that this turning -- turning what  
16 is self-imposed guilt and feelings of being caught and being  
17 presented with the evidence against him is what's compelling  
18 him to talk at that point or what's making him to decide to  
19 talk at that point.

20          And it is not any type of government coercion.  
21 These agents were extremely patient with him, and the  
22 periods of silence that are being turned into a  
23 blitzkrieg-like attack is just hyperbole at this point.

24          It doesn't bear out of what happened in that  
25 video. It was giving Mr. Brinson plenty of time to decide



1 how he wanted to direct this interview.

2 Just because he decided to partake in the  
3 interview doesn't mean that that should get suppressed, and  
4 that seems to be what defendant's argument is, is that,  
5 because he was there a long time and he decided to make  
6 statements, that that should be suppressed.

7 THE COURT: Thank you, Ms. Kupersmith. I  
8 appreciate it.

9 Mr. Nicolaysen, I will give you a brief  
10 opportunity to respond, but I do want to shift over to the  
11 next motion.

12 MR. NICOLAYSEN: I get that.

13 Well, the government and I see two very different  
14 videos especially in the first hour.

15 But to the extent the government would have the  
16 Court believe the agents were courteous and, quote/unquote,  
17 extremely patient and, quote/unquote, the agents were calm,  
18 that's all part of the tactic. That's not a positive that  
19 weighs against.

20 THE COURT: As it relates to that point though,  
21 law enforcement can use tactics. And to be fair, this is  
22 not like a Netflix movie "When They See Us."

23 They're not like beating down on an individual.  
24 They're taking their time, which is a tactic.

25 MR. NICOLAYSEN: When terrorist suspects are being

1 interrogated at black sites, these tactics are used all the  
2 time. It's not physical aggression, and it's a wearing down  
3 process. When you have someone who has never been in that  
4 situation before and is absolutely terrified, it's all about  
5 wearing down --

6 THE COURT: But is the standard an objective  
7 standard or subjective because it seems like you are saying,  
8 because your client was inexperienced, never been in this  
9 process, that the standard should shift or be different.

10 MR. NICOLAYSEN: It's very specific to the nature  
11 of the interrogation and the suspect himself. There are no  
12 black and white rules.

13 But after he invokes his assertion, "You said I  
14 could have a lawyer," and the agents essentially blow him  
15 off as we've already discussed and they put the burden back  
16 on him, and then the agents redirect the discussion -- and  
17 that concept is in my papers -- it's very important. The  
18 agents just redirect the conversation away.

19 That does something to you psychologically because  
20 you have already said, "You said I could have a lawyer," and  
21 there is no Velcro. The agents are not engaging, they're  
22 blowing you off. That has a tremendous effect on you.

23 Here we have, when the government says the agents  
24 offered him breaks and offered him water, that just is a  
25 complete mischaracterization. My papers discuss at length

1 the point where Mr. Brinson points out he is ready to vomit  
2 and he asks for the trash can to vomit in. And as a clear  
3 tactic of coercion the agents refuse his request, and they  
4 basically say, "Get it yourself." So instead of offering  
5 him a rest break or --

6 THE COURT: Mr. Nicolaysen, "Get it yourself," is  
7 not like it's go outside and go to CVS and get a garbage  
8 bag. There was a can in the room.

9 MR. NICOLAYSEN: But we have to again put  
10 everything in context. We have just listened to government  
11 counsel paint this picture of diplomacy and respectfulness.  
12 It's anything but.

13 And by the time this vomiting issue came up, it  
14 was very late in the one-hour period. We're starting to see  
15 physical manifestations of illness. And that's where  
16 Brinson breaks at the one-hour point. It's a state --  
17 everybody in this courtroom would go through that.

18 We just tend as lawyers to talk about things a  
19 little too abstractly. So we don't see the true nature of  
20 the control and the wearing down and what human beings go  
21 through.

22 These agents were very, very shrewd when they say  
23 to him, "It's Day 1. You have got to push forward." That's  
24 a quote. And he's already said, "You said I could have a  
25 lawyer." "It's Day 1. You have got to push forward."

1 They'll have none of his legal rights. They want  
2 information. That does something to you.

3 So we can't get caught up in these kind of  
4 formulaic approaches under the Davis opinion and others. We  
5 have to look at the dynamics of what happened in that room.

6 I do ask, Your Honor, if the Court has the time,  
7 look at that first hour or at least pieces of it because you  
8 see the agregation of the stress, and the agents' so-called  
9 calmness is a very calculated calmness that is every bit of  
10 stress-inducing as actual beating.

11 So my judgment, Your Honor, these statements  
12 should be suppressed. The Government's overreached.

13 I understand Your Honor wants to move on to the  
14 next motion.

15 THE COURT: The motion to suppress the physical  
16 evidence.

17 MR. NICOLAYSEN: Yes.

18 THE COURT: On this one, Mr. Nicolaysen, wrong or  
19 right, you have done this a long time. It strikes me there  
20 is more than abundant probable cause. And moreover, the  
21 Vehicle Code is a thick book, and this evidence would have  
22 been discovered in any event for a whole host of reasons.

23 I'm not sure it was even necessary to go through  
24 the analysis, but the car is parked the wrong way, the car  
25 likely would have been towed.

1           It just strikes me -- again this is one of those  
2     that I think is a bit of an uphill climb to suppress the  
3     evidence, but I want to hear from you on this point.

4           MR. NICOLAYSEN: I thank the Court. As the Court  
5     knows, I briefed the issue at length. So let me just do  
6     some highlights.

7           First, the government has done what I call a  
8     bait-and-switch. In their law enforcement forms, it is  
9     treated as a vehicle impound and an inventory search, and it  
10    is characterized as such in the reports of investigation and  
11    in Agent Kwong's affidavit for the search warrant. It has  
12    always been an inventory search.

13          And we know inventory search procedures. First,  
14    there has to be a valid impoundment. And once the valid  
15    impoundment has been done -- and that means you are at the  
16    tow yard essentially -- then the inventory search is  
17    conducted. It's not designed for rummaging -- and that's a  
18    term of art. It's discussed in my papers -- to go hunting  
19    for incriminating evidence, which is what happened here.

20          In the government's opposition, lo and behold --  
21    it's like Casablanca. I am shocked and horrified -- now we  
22    start seeing other legal theories popping up, and I think  
23    it's because the government realizes the lack of  
24    sustainability of the inventory search theory.

25          Now we see plain view. Oh, the agents saw the

1 blanket and the handbag containing the laptop in plain view,  
2 and attached to one of the agent's declarations is the photo  
3 of Mr. Brinson's vehicle.

4 And when we look at this vehicle photo, we see  
5 tinted windows and we see a design that means the only way  
6 there could ever be plain view -- and I highlight plain view  
7 is nowhere to be found in the search warrant affidavit or  
8 reports of investigation ROIs. But anyway, they argue plain  
9 view. That's not a vehicle that lends itself to plain view.  
10 From the outside you can't see it.

11 THE COURT: Is that fair, though? Because I  
12 thought there was some dispute about, you know, did they see  
13 it as he was getting to the car with the car door being  
14 opened? Maybe I'm wrong on that. Are you saying the plain  
15 view was through these tinted windows?

16 MR. NICOLAYSEN: It would have to be. But  
17 Mr. Brinson was not allowed to get back in the car. And why  
18 would the agent --

19 THE COURT: That's my point. He wasn't in the car  
20 when he was arrested. Right?

21 MR. NICOLAYSEN: He is outside on the street, and  
22 that takes us to one of the misrepresentations in  
23 Agent Kwong's search warrant affidavit where she states the  
24 car was stopped.

25 And the reason that she states the car was stopped

1 is because under the Vehicle Code, which is 22651, that is  
2 the standard under California law for -- one of the  
3 standards, not the only standard -- for conducting an  
4 inventory search. Again, these are in my papers. I'm just  
5 highlighting this.

6 So we have Section (h)(1) which among the listed  
7 criteria where the peace officer can do the impound -- and  
8 it says when an officer arrests a person driving or in  
9 control of a vehicle.

10 Well, Mr. Brinson was neither. He was walking  
11 back to his car. And Agent Kuzma's report of investigation  
12 does admit that, but that doesn't work with this Vehicle  
13 Code Section 22651.

14 He is neither driving or in control. So what  
15 Agent Kwong said which was a flat-out lie -- I am sorry I  
16 have to say this on the record -- in her search warrant  
17 affidavit was the vehicle was stopped. This is in my  
18 papers.

19 That's why I am asking for a Franks hearing.  
20 That's just the tip of the iceberg. What we have now in all  
21 of these affidavits is sort of this confused mishmash of,  
22 well, when did this so-called impoundment occur?

23 Now the government says, well, the impoundment  
24 occurred actually at the curb site because the government  
25 knows the Vehicle Code section wasn't complied with.

1           So now they redefine the events of the  
2   impoundment. They say, The impoundment occurred right there  
3   on the street, and that's when the evidence was taken out by  
4   the sheriff's deputy who did the impound report and she puts  
5   that same Vehicle Code section down on her report, not  
6   realizing that it doesn't apply.

7           All of a sudden now the impound didn't occur --  
8   the impound occurs on the street before any towing is done  
9   because the government realizes now that Vehicle Code  
10   section was not complied with.

11           Well, the Fresno officer wants to help the  
12   government. So in her papers she says, Well, that's okay.  
13   There is another Vehicle Code section that would have  
14   allowed the impound, and that's Vehicle Code  
15   Section 22655.5.

16           And removal of vehicles used in crime or liens --  
17   and I have yellow highlighted here subsection B -- "When any  
18   vehicle is found upon a highway or public or private  
19   property and a peace officer has probable cause to believe  
20   that the vehicle itself" -- I'm sorry, "that the vehicle is  
21   itself evidence which tends to show that a crime has been  
22   committed or that the vehicle contains evidence which cannot  
23   readily be removed."

24           Well that, "which cannot readily be removed,"  
25   we've seen many of these cases with secret compartments in



1 vehicles, and that requires special equipment at the police  
2 yard. You are not going to be using blow torches to get  
3 into the secret utility compartments on the street. This  
4 provision says you can impound those types of cars.

5 But that's not this case. This case -- and the  
6 declarations are clear -- it's all about going in and  
7 grabbing everything. The agents took the laptop and took  
8 the blanket right there at the street before the car got  
9 towed. That's not evidence which cannot readily be removed.  
10 Nothing can be more readily than what happened here.

11 And the Fresno sheriff detective said, "The car  
12 itself is evidence, and we may want to take DNA from the  
13 car." That's just nonsense. There has never been DNA taken  
14 from the car, and the car itself is not evidence of  
15 anything.

16 So it's all contrived. It's an attempt to put a  
17 circle in a square in opposing my motion because technical  
18 as the motion may be -- and these inventory search motions  
19 are technical -- the government simply was perhaps a little  
20 too hasty in what they did. Perhaps they never thought they  
21 would be challenged in a suppression motion.

22 So Brinson is stopped as he is walking to the car.  
23 He is not driving or in control --

24 THE COURT: Is the car door open? What's your  
25 position?

1 MR. NICOLAYSEN: My position is the car door is  
2 not open. I would want an evidentiary hearing on that.  
3 It's too contrived. It's almost like a screenplay.

4 It's -- I hate to impugn the integrity of law  
5 enforcement, but the problem is in these cases -- and I know  
6 members of the public are here -- these are very emotional  
7 cases. The agents put their heart into these cases.

8 And all of us in society, actually just stepping  
9 outside of my role as defense counsel, but I have children  
10 too. We all appreciate and respect that, but the rules are  
11 the rules and process is process, and we can never allow the  
12 nature of the charges or the emotional impact those charges  
13 have -- and I can only imagine how the families feel -- to  
14 override our commitment professionally to the adherence to  
15 process.

16 And here process was completely circumvented by  
17 overzealous agents who just saw that car and did whatever  
18 they needed to do to get in and grab what they wanted.

19 And then they try to clean it up in opposing this  
20 motion because impounding was not properly done, which means  
21 you can't get to Step 2, which is conducting an inventory  
22 search, which is what they told the issuing judge for the  
23 warrant, which is what they wrote in their reports.

24 Now we say in plain view. Now we're scrambling,  
25 the government is scrambling. One of the reasons I want the

1 Franks hearing -- and I will conclude my remarks by simply  
2 asking for the hearing. I am not asking for a ruling on the  
3 merits on this motion. I don't ask for the hearing on the  
4 statements motion. Your Honor has the evidence.

5 But here we have so many non-committal assertions  
6 in Deputy Veneman, the Fresno deputy in her declaration,  
7 Agent Kwong, Agent Kuzma, the search warrant affidavit.  
8 Nobody wants to take responsibility for who actually took  
9 the items out of the car or when exactly it was taken out of  
10 the car.

11 And when we start tracking all of these details,  
12 we start hearing the little children's story of the little  
13 red hen. Who took those items? Not I, said the little red  
14 hen. That's this agent. I was there. I observed an  
15 inventory search was conducted.

16 Suddenly the government uses the past tense  
17 because, if you use the active tense in grammar, you need a  
18 noun, and you need to identify who did it. They're not  
19 going to do that one. So they're being very coy in being  
20 non-committal and imprecise because they blew it. They  
21 clearly violated the inventory search process.

22 Somebody -- and I appeal to Your Honor's  
23 tremendous experience before taking the bench and  
24 supervising and being in charge -- somebody, in my opinion,  
25 was told by a supervisor who reviewed these matters that

1 same day and said, "You better go get a warrant because I am  
2 not inspired by the way things were done without a warrant."

3 And so by -- these events happened between  
4 10:00 and 11:00 A.M. By 4:00 o'clock that same day a  
5 warrant is obtained. Why? Why? If they're so confident  
6 legally that the warrantless search was proper, why? Well,  
7 look at the warrant application. It raises its own  
8 problems.

9 There was an awareness of non-compliance of the  
10 Vehicle Code. That probably was one of the comments made by  
11 a supervisor. "You don't have a valid inventory search."

12 So in the affidavit this statement is a  
13 misrepresentation -- the vehicle was stopped. It wasn't  
14 stopped. It was parked on the street. The vehicle was  
15 stopped. That would be what the Vehicle Code says if he is  
16 driving or if he's in control like he's behind the steering  
17 wheel. That was the impression conveyed in the search  
18 warrant affidavit -- is flat-out misrepresentation.

19 So we need a hearing. We really do. I want to  
20 get these agents up there, and I want to get some clarity,  
21 and I think we'll find there was a recognition even on that  
22 day that the impound, slash, inventory search standards were  
23 not complied with.

24 THE COURT: Let me ask you this: Let's assume for  
25 the sake of this question that everything you say is

1 accurate.

2           The government also responds by saying, look, this  
3 car was going to get towed no matter what. It was parked on  
4 the wrong side of the street. That in and of itself is a  
5 Vehicle Code violation that would have resulted in its  
6 impoundment and, therefore, they would have found these two  
7 items in any event.

8           MR. NICOLAYSEN: But the inevitable discovery rule  
9 is not going to be their safety valve here.

10          THE COURT: Why?

11          MR. NICOLAYSEN: Because it doesn't allow this  
12 violation to be excused. We -- for example, there is  
13 nothing about inevitable discovery in the reports of  
14 investigation or in the search warrant affidavit.

15          The search warrant affidavit is a very compelling  
16 document because it doesn't teach the issuing judge any  
17 perspective that the government now is arguing in an attempt  
18 to defend the motion.

19          Everything the government says in opposition to my  
20 motion should have been in that search warrant affidavit.  
21 Agent Kwong should have been candid with the issuing judge.

22          The government may or may not have complied  
23 technically with the impound, slash, inventory search, but  
24 we maintain inevitable discovery regardless of any violation  
25 for the following reasons.

1 Deputy Veneman is their safety valve here. She is  
2 the one who shows up now in this opposition and says, "I was  
3 going to tow the vehicle any way. It was parked on the  
4 wrong side of the street." Why? That's her talking. They  
5 don't cite a specific rule.

6 Let me just take a moment. I realize I am taking  
7 up time. One more citation here if I may.

8 Here we are, the Fresno policy. Fresno Sheriff  
9 Department policy. It's an exhibit to Deputy Veneman's  
10 declaration; so I am not introducing anything new. This is  
11 actually part of the government's opposition.

12 THE COURT: Right.

13 MR. NICOLAYSEN: Goes to the inevitable discovery.  
14 So here is the Fresno Sheriff Department impound policy.

15 Impounds, subsection (b)(1), quote, "Only vehicles  
16 used to commit a crime and needed as evidence are to be  
17 impounded," period. "All others are to be stored," period,  
18 unquote.

19 Government doesn't say this is a storing.  
20 Government says it was an impound. What happened here is  
21 not consistent with the Fresno Sheriff Department Policy on  
22 impounds. It's not. And Your Honor knows the community  
23 caretaking exception.

24 It's all about compliance with police department  
25 policies. And we have a policy from Deputy Veneman's

1 department, which is not satisfied here. The vehicle was  
2 not used to commit a crime, and the vehicle was not needed  
3 as evidence. Those two things are clear.

4 This vehicle has no relevance to the government's  
5 case in chief. It's just a vehicle that he drove. They  
6 drove to that house.

7 Government counsel will tell you that my client  
8 brought the young child back home. I get it. And so the  
9 vehicle is aiding and abetting that? Come on. That's not  
10 what this impound policy is about. This vehicle is not used  
11 to commit a crime, and it is not needed as evidence.

12 Therefore, applying the community caretaking  
13 standard which is required by law, there is no compliance  
14 with the policy on impounds of the department at issue, end  
15 of discussion. The government cannot treat this properly as  
16 an inventory search because no valid impound was conducted,  
17 and that is a condition precedent to the inventory search  
18 itself.

19 What we do have, as I argue in my papers, is  
20 rummaging. The agents were just so eager to get into his  
21 car right there at curbside they basically lost perspective,  
22 probably thought they would never be held accountable in a  
23 suppression motion, and grabbed what they thought might be  
24 relevant.

25 And when we see the inventory report that the

1 deputy filled out, the actual inventory report -- here it  
2 is. Last one. I know we're pressed for time. I do  
3 understand.

4 This is Exhibit E to my motion. This is the  
5 Fresno Sheriff Department vehicle report. Once the vehicle  
6 was towed to the tow yard, Deputy Veneman filled this out,  
7 and it says 11:30 A.M. That really tells me -- and I wrote  
8 the motion with this understanding -- that this form was  
9 filled out at the tow yard.

10 "Oh, no," says Deputy Veneman. "We filled it  
11 right there at curbside."

12 That's nonsense because Agent Kwong's report  
13 states that the -- Agent Kwong's report -- this is agent  
14 Kwong's report here, Exhibit C to my motion, points out that  
15 the laptop, which is critical evidence in this case, was  
16 taken from the car at 10:45 at curbside. They're not  
17 standing there for 45 minutes.

18 But when we go back to the actual inventory report  
19 here by the deputy, which I am clear in my mind was done at  
20 the tow yard although they deny it -- I think they're  
21 lying -- first she puts 22651(h)(1) up there as the  
22 Vehicle Code, the one that I discussed earlier that clearly  
23 doesn't apply, and the most important thing is, boy. Look  
24 at this list of items that are inventoried there in  
25 handwriting.



1           You look at them, and nowhere in that little  
2 handwritten group of items taken from the car for inventory  
3 are the items taken by the feds -- the blanket, the laptop.

4           That's because the feds went in right there at the  
5 street, took what they wanted, and then let the car be towed  
6 to the yard and whatever other items unrelated to their  
7 investigation were still in the car show up on this  
8 inventory.

9           That's exactly what an inventory search is not.  
10 That is rummaging. The agents rummaged through the car at  
11 this curbside, took what they wanted, and let the car be  
12 towed. This is a clear violation of the rules, Your Honor.

13           Thank you.

14           THE COURT: All right. Let me hear from the  
15 government.

16           MS. MYERS: I think the government's papers  
17 sufficiently address the defendant's argument that were made  
18 here. I will hit some of the highlights, but I think the  
19 most important thing here is that defendant or defense  
20 counsel blows past the fact that there was probable cause  
21 because he wants to point to small details about the  
22 inventory search that he finds problematic.

23           That's not the inquiry. The inquiry is that there  
24 was probable cause. The items were legitimately and  
25 lawfully seized.

1           The defense counsel has submitted no declaration  
2     from defendant, and his claims that the agents were lying is  
3     based on his pure speculation, defeats sufficient grounds  
4     for a Franks hearing. Additionally, the things that he  
5     claims were lies, quote/unquote, in the affidavit aren't  
6     even relevant to the determination of probable cause.

7           Therefore, the Court should deny defendant's  
8     motion, deny their request for a Franks hearing, and deny  
9     the motion to suppress.

10          Most importantly here there was probable cause to  
11     search Defendant Brinson's vehicle. The photographs that  
12     were taken that are submitted with the government's papers  
13     document what happened that day.

14          There is no conspiracy to cover up and open up  
15     defendant's door. He was observed parking in front of the  
16     victim's mother's house and carrying a victim that law  
17     enforcement had identified earlier that day, into the  
18     premises, returning back to his vehicle.

19          At that point in time his car was blocked by  
20     Agent Kuzma's car as explained in the declaration.  
21     Agent Kuzma had him move away from the car, and Agent Kuzma  
22     couldn't remember whether Brinson was in the car or just at  
23     the car. And we don't know because defendant didn't submit  
24     his own declaration, but the photographs taken therein  
25     showed that the property that was removed from his person is

1 right near the car.

2           Additionally, defense counsel now argues that we  
3 are manufacturing a plain view argument and a probable cause  
4 argument, and that is not the case.

5           As documented in Agent Kuzma's ROI, which is  
6 submitted as government's Exhibit D at page 72 and 73, it  
7 relays the fact that Agent Kwong saw these items in the back  
8 of defendant's car at the time.

9           Moreover, as attached to Agent Kwong's  
10 declaration, Exhibits 5 and 6, they are photographs of what  
11 agents saw that day in defendant's car. And, yes, his  
12 windows are tinted, but they are not opaque, and the car  
13 door was open. And you see in Exhibit 5 to Kwong's  
14 declaration, Agent Kwong's declaration, that you can see the  
15 blue and white Dallas Cowboys blanket in the defendant's  
16 back seat along with the laptop bag. That's Exhibits 5 and  
17 6, Your Honor.

18           At that point in time we don't need to indulge in  
19 this inventory search inquiry because, as long as there is  
20 probable cause -- and that's with the entire line of cases  
21 that go into the inventory search inquiry -- as long as  
22 there is probable cause, it's the end of the story. You are  
23 allowed to conduct a warrantless search of the vehicle, and  
24 we are well in access of the probable cause standard here.

25           It wasn't there was a fair likelihood that

1 evidence of Defendant Brinson's crimes would be recovered  
2 from that vehicle. They saw evidence of the crime. They  
3 saw the Dallas Cowboys blanket that was in the child  
4 pornography that Defendant Brinson had produced that they  
5 had learned earlier that day was a blanket that had been  
6 given to him by the victim's grandmother at Christmastime,  
7 and the blanket in the back seat of the car is an identical  
8 match.

9           Additionally, there is a laptop bag. We know that  
10 this defendant, the online producer of child pornography, is  
11 using a computer -- he is using digital devices to both  
12 record the acts of sexual abuse and then upload them to the  
13 Internet.

14           They didn't see a laptop. That's for sure, but  
15 they saw a laptop bag, and it is more than a fair  
16 probability to anticipate that there would be a laptop in  
17 that laptop bag.

18           At that point in time, law enforcement officers  
19 had probable cause to search the vehicle and to search for  
20 evidence of the crime that they had reason to believe  
21 defendant had committed, which included recovering the  
22 packets of placards from the CP the defendant had produced  
23 which were in the laptop bag.

24           At that point in time the Court really needs to go  
25 no further. Now, we provided declarations because I think

1 it was a little bit unclear from defendant's motion what  
2 exactly happened that day, and I think the declarations make  
3 clear exactly what happened. There was probable cause.  
4 Even if there wasn't probable cause, there was a valid  
5 inventory search.

6 There was a case that has been published since the  
7 government has filed its opposition, and that's  
8 United States versus I think it's pronounced Garay, and it's  
9 from the Ninth Circuit, it's an inventory search case, it's  
10 Number 18-50054, 2019 WestLaw 4419679.

11 And in that case, Your Honor, the government -- or  
12 the Ninth Circuit upheld an inventory search. The defendant  
13 had led the police officers in that situation on high-speed  
14 chase and then crashed his car in a ditch. The Ninth  
15 Circuit said because -- quote, "because the site was in  
16 effect a crime scene, the items in the car were sensibly  
17 treated as evidence."

18 THE COURT: Are you arguing in this case was the  
19 car a crime scene by virtue of seeing Mr. Brinson with a  
20 victim, or what's the analogy?

21 MS. MYERS: Yes, Your Honor. One, because the  
22 defendant had been in the car and then used it to transport  
23 a victim and that there was evidence of the crime in the  
24 car.

25 And I think that goes to the argument that that is

1 why Detective Veneman had it stored inside and for evidence  
2 is because at the time what they knew was defendant was  
3 sexually abusing the victim that he had transported in that  
4 vehicle. They didn't know if he had abused the child in the  
5 car, but if he had, there might likely be DNA evidence in  
6 the car which would render it as part of a crime scene.

7 THE COURT: You are saying this was an inventory  
8 search. You heard Mr. Nicolaysen argue this was more of an  
9 impound search. What's your response?

10 MS. MYERS: I don't know that there is a  
11 difference that makes a legal import here. As  
12 Deputy Veneman explained, she was either going to tow the  
13 car for impound or tow the car for storage. She could not  
14 leave it there. It was parked incorrectly. It was -- the  
15 defendant had been arrested, and it was his car.

16 THE COURT: Family members or other individuals  
17 that were going -- either became aware or were going to  
18 become aware of what this issue was.

19 MS. MYERS: Yes, and the car was parked directly  
20 in front of their house; so it couldn't be left there. And  
21 whether she is towing it for storage or whether she is  
22 towing it for impound, an inventory search has to be  
23 conducted, and that's within the policy that is attached to  
24 our exhibit and the same policy that defense counsel cited  
25 today.

1           So we have one inevitable discovery argument, and  
2           that brings us to the affidavit which defense counsel makes  
3           much of the fact that our agents are so caught up in the  
4           nature of the crime that they are willing to bypass crucial  
5           procedures.

6           And I would submit that that's the exact opposite  
7           of what happened. Our agents know the stakes. They know  
8           they have to get it right. They know that they are going to  
9           do everything they can to preserve the evidence and do it  
10          carefully so that the defendant can't prevail on a  
11          suppression motion.

12          And I would submit that the affidavit in support  
13          of the warrant is a belt and suspenders efforts by the  
14          agents to make sure they can dot every I and cross every T  
15          in terms of maintaining the evidence.

16          Moreover, the statements that, you know,  
17          defendant -- defense counsel claims are, quote, "outright  
18          lies," close quote, have nothing to do with the  
19          determination of probable cause.

20          I see Your Honor seems to appreciate the arguments  
21          here. I think that I have addressed the points that defense  
22          counsel has raised. So unless you have further questions, I  
23          will submit, Your Honor.

24                THE COURT: Thank you. I appreciate it.

25                MR. NICOLAYSEN: May have a moment, Your Honor?

1 THE COURT: Briefly. We're coming up on two hours  
2 here.

3 MR. NICOLAYSEN: I understand.

4 Your Honor, I respectfully disagree that the  
5 automobile exception which is the doctrine by which a  
6 warrantless search of a vehicle can be done applies here.

7 We all know the doctrine. If the officers have  
8 probable cause to believe that the vehicle contains  
9 contraband, fruits of an offense, they can search the car.

10 We've seen that repeatedly with surveillance teams  
11 that see events where suspects in an ongoing drug  
12 investigation go to a house they think is a stash house,  
13 come out of the house, get in the car, surveillance team  
14 radios to a black-and-white to conduct a traffic stop, there  
15 is probable cause to believe there is drugs and the drugs  
16 are seized from the car.

17 But here there was no antecedent events leading up  
18 to this arrest of Brinson --

19 THE COURT: Is that fair to say given the nature  
20 of the allegations here? They see Mr. Brinson with a  
21 alleged victim. Okay? They don't know where they've been,  
22 what they've done, or what they're about to do.

23 Based on the charge, is it not unreasonable for  
24 the officers to believe that there may, in fact, be evidence  
25 of a crime contained in that vehicle?



1 MR. NICOLAYSEN: I think they are two completely  
2 different concepts, and the location was under surveillance.  
3 There was some surveillance, but it was not the type of  
4 surveillance that would segue with the automobile exception  
5 where you are seeing criminal activity happening and then  
6 that criminal activity now is linked to the vehicle.

7 THE COURT: I get it's not the same as your  
8 drug --

9 MR. NICOLAYSEN: But that's a classic application  
10 of automobile exception. Surveillance sees criminal  
11 activity, criminal activity then on a continuance basis that  
12 afternoon, evening is now linked to that vehicle, probable  
13 cause --

14 THE COURT: But that's not the only example of an  
15 automobile exception.

16 MR. NICOLAYSEN: But it's a useful one here  
17 because here there is no evidence of criminal activity  
18 linking to the vehicle such that the vehicle would have  
19 evidence of a crime.

20 I agree that there is serious cause for concern --  
21 he's bringing a boy back to the house. We get it. And law  
22 enforcement was already aware of that location and proceeded  
23 to do interviews.

24 But the presence of a child -- he is taking the  
25 child back in the house -- is distinct and separate from

1 whether contraband is in the car itself.

2 This is not that type of crime unlike a drug case,  
3 for example, where you would see a correlation between the  
4 presence of a child in the passenger seat is now being taken  
5 out of the car and brought home and the presence of  
6 contraband in the car, Number one.

7 So the automobile exception doesn't apply, and I  
8 emphasize that neither the reports of investigation nor the  
9 search warrant affidavit makes any reference to that  
10 theory -- in other words, is a theory that was created  
11 during this litigation by the U.S. Attorney's Office to  
12 oppose the motion.

13 That's very important because the agents always  
14 characterize this in the search warrant affidavit and the  
15 reports as an inventory search, which it is not.

16 The government says the car was a crime scene.  
17 I'm sorry. It's not a crime scene. The recent case that  
18 just came down, Garay from the Ninth Circuit, there you have  
19 a high-speed chase, you have events leading -- it's exactly  
20 what I way just mentioned. You have criminal events leading  
21 up to the taking of the car, and the car itself is the  
22 crime, the high-speed chase committed by the car. The car  
23 committed the crime.

24 So now the car itself, going back to the inventory  
25 search standards where the car is evidence of the crime and

1 the car now itself as a vehicle becomes the crime scene, we  
2 don't have that here.

3 We have Brinson driving up to the curbside,  
4 getting out of the car with the child, bringing him in the  
5 house -- that's not a crime scene. So the Garay case simply  
6 doesn't apply.

7 And the last thing in regard to inevitable  
8 discovery -- and this is my final point because I know we're  
9 pressed for time, but this is very important in terms of --  
10 the government -- the agents had to go inside the car and  
11 take the bag containing the laptop out of the car and open  
12 that bag and look in, and there is a laptop.

13 So the laptop is not plain view, and there was no  
14 basis whatsoever for probable cause to believe that a  
15 digital device would be in that car.

16 The agents had to --

17 THE COURT: I have to stop.

18 MR. NICOLAYSEN: Sure.

19 THE COURT: You are saying that the law  
20 enforcement seize a computer bag.

21 MR. NICOLAYSEN: Seize a bag.

22 THE COURT: I think they said computer bag.

23 MR. NICOLAYSEN: The government is all about  
24 characterizations.

25 THE COURT: If they say it's a bag, given the

1 nature of the crime, it's not reasonable for them to assume  
2 or think that that bag might contain a computer given again  
3 the nature of this crime.

4 MR. NICOLAYSEN: In order for them to get to the  
5 point where they would see the bag and look in the bag, the  
6 agents would have to be in the car.

7 THE COURT: But wait a minute, Mr. Nicolaysen.  
8 Let's just be fair here. I get you're vigorously defending  
9 your client. I don't think you can say that, in order to  
10 see the bag you have to be in the car. I saw the photos. I  
11 mean, it's a tint. Don't get me wrong. But you can see  
12 through the tint.

13 And, secondly, assuming the government is accurate  
14 and the door is open, you can see inside the car.

15 MR. NICOLAYSEN: You see a bag, and that's all you  
16 see. So there is no plain view. And by the time the search  
17 warrant application was submitted at 4:00 P.M. that day -- I  
18 don't care what the government says. Those agents had  
19 already gone through the evidence, and they probably didn't  
20 get into the computer -- maybe yes, maybe no -- in terms of  
21 passwords, that could very well be.

22 But the application for the search warrant --  
23 okay? -- was tainted. It was already corrupted by the  
24 government's knowledge of the evidence in the car. So it  
25 was -- they wrote the application after the fact. You can't

1 call it inevitable discovery.

2 So this is the type of circumstance where the  
3 Court should not allow the government to clean it up after  
4 the fact.

5 The only reason they applied for the warrant was  
6 because somebody somewhere, the agents or their supervisors,  
7 said this is not a sustainable warrantless search. We need  
8 to clean this up. And they apply for the warrant, and they  
9 make a false representation in the warrant to suggest that  
10 impounding was lawful when it was not, and they already know  
11 the evidence.

12 You know, when you apply for a warrant, you are  
13 not supposed to know the evidence, but they -- here you have  
14 probable cause to believe, they're saying we have probable  
15 cause to believe about something they already have. And  
16 that is a direct contradiction of the analysis on probable  
17 cause. They should never have had that evidence in their  
18 possession by the time they applied for the warrant.

19 So the warrant itself does not resolve the  
20 inventory search analysis, Your Honor.

21 Let me make one last point about the statements  
22 motion real fast. There was no signed waiver. I just want  
23 Your Honor to be aware of that in the analysis of invoking  
24 your right to counsel. The agents did not present a waiver  
25 form. He did not sign a waiver form.

1 THE COURT: All right. Thank you.

2 MR. NICOLAYSEN: Thank you, Your Honor.

3 THE COURT: We've been going at this now for two  
4 hours. Why don't we take a 15-minute break, and then we'll  
5 resume with the last motion, Mr. Lawniczak's motion to  
6 sever, and then we'll go from there. Let's take a 15-minute  
7 recess. Have everyone come back at 20 after 12:00. All  
8 right. Thank you.

9 THE CLERK: All rise. This Court is in recess.

10 (Recess taken at 12:03 PM to 12:26 PM.)

11 THE COURT: All right. I think the last motion to  
12 discuss this afternoon is the motion to sever with respect  
13 to Mr. Lawniczak.

14 Mr. Nishi, the floor is yours.

15 MR. NISHI: Yes, Your Honor. I prepared a motion,  
16 and I thought I was very thorough in what I put in and --

17 THE COURT: You were.

18 MR. NISHI: And I have nothing additional to add.  
19 I'd just be repeating myself. So unless the Court has any  
20 questions, I would submit it.

21 THE COURT: So I have a couple of questions and  
22 somewhat similar to the other motion to sever.

23 Look, he is charged with -- this is a case  
24 involving a child exploitation enterprise. The allegation  
25 is that he owned the residence where this activity -- where

1 some of this activity took place. And there is at least an  
2 allegation that he may have been involved in the production  
3 of it in some way at the location.

4 Does that not, for lack of a better term, sort of  
5 inextricably intertwine all these defendants for purposes of  
6 this discussion and analysis on a motion to sever?

7 MR. NISHI: No, Your Honor. What distinguishes  
8 Mr. Lawniczak from the other defendants is his relationship  
9 with the Website which carries all the egregious  
10 photographs, et cetera.

11 He is not part of the Website itself. He is not a  
12 member, never has been a member, never posted there. His  
13 name is totally devoid in that particular Website, and yet  
14 that is the worst evidence that's going to be produced.

15 So as he is being tried for his conduct, which the  
16 Court has mentioned, all this other evidence is going to be  
17 coming out.

18 And that is the type of evidence that I think has  
19 the major detrimental impact upon my client. So that's  
20 where the distinction factor comes in.

21 And I don't think separating him from the others  
22 creates much of a judicial problem because I don't think the  
23 trial will be that long with respect to Mr. Lawniczak. The  
24 evidence against him is very small compared to the others.

25 THE COURT: I think the government might disagree

1 with you as it relates to the extent of the evidence against  
2 Mr. Lawniczak.

3 But what about the concern or at least the  
4 government's intending to introduce evidence of  
5 Mr. Lawniczak's knowledge of the Website and his presence at  
6 the house when the pornography is being produced and  
7 perhaps -- I don't know if it will come in, but at least  
8 there is an intention of the government to offer evidence of  
9 Lawniczak's participation in abuse of children?

10 MR. NISHI: That particular production, we are  
11 talking about one production, and it is still questionable.  
12 We are still challenging that production.

13 It's not like he is constantly doing it. That  
14 would be a different question. But the fact that they have  
15 evidence that suggests one possible contact I don't think is  
16 enough to bring in the whole kit and caboodle.

17 Evidence that we would submit did occur. It's not  
18 an issue. It's not an issue in this particular case as to  
19 Mr. Lawniczak.

20 THE COURT: But can't all this -- to the extent  
21 you have concerns, can't all this be cured by a jury  
22 instruction?

23 MR. NISHI: I don't believe so. I think this is  
24 type of case that no matter what the jury -- what the Court  
25 instructs, it's difficult for people to separate the



1 prejudice in this particular case against the defendants.

2           The pornography is such a troubling crime that I  
3 think whenever anyone hears about it, the first thing, they  
4 coil in revile and they start looking at the person saying,  
5 "How could that person have done it?" It's not your typical  
6 kind of case. I think in other types of crimes we often  
7 give those individuals the benefit of the doubt.

8           I think in a child pornography, especially if they  
9 know that he knows at least one of the other participants, I  
10 think the burden is placed upon him. And I don't care what  
11 instruction can be given by the Court. I think his tarnish  
12 can never be cleaned. He is forever going to be placed  
13 within that group of individuals who are going to be tried.

14           THE COURT: Thank you, Mr. Nishi.

15           Let me hear from the government with respect to  
16 this motion. I think Mr. Nishi makes some valid points in  
17 the -- again, in the scheme of things.

18           Mr. Lawniczak's involvement seems to be less than  
19 the others charged, and is there a risk that, given the  
20 nature of the charge, there might be a negative spillover  
21 effect as it relates to Mr. Lawniczak.

22           MS. KUPERSMITH: Your Honor, I would start just by  
23 pointing out to guiding principles in the world of  
24 severance. One is that there is a very strong preference  
25 indicated for the courts for joint trials. And second is

1 that disparity of volume of evidence is not grounds for  
2 severance.

3 And I think Mr. Lawniczak in his motion  
4 significantly minimizes the connection of his charges to the  
5 other defendants. Presuming even we separated him out, the  
6 government is still prosecuting him on his engagement in the  
7 child exploitation enterprise for Count 1 as well as his sex  
8 trafficking of a child which has significant overlap with  
9 Mr. Harrell's Count 17 of obtaining custody for the purpose  
10 of producing child pornography.

11 Even the destruction of evidence charge relates  
12 significantly to the text messages which indicate an  
13 interest in sexual abuse of children including specifically  
14 an interest of one of the named victims. And that's just on  
15 the face of the Indictment.

16 So I think it doesn't actually solve any problems  
17 to sever him because there is a significant amount of  
18 overlapping evidence.

19 THE COURT: In fairness though, I guess Mr. Nishi  
20 would argue that's the point. If he is severed, even though  
21 there is an overlap in evidence, he will not be on trial  
22 with others and it will just be himself on trial.

23 MS. KUPERSMITH: Yes, but that is not -- that's  
24 not the standard. The -- the standard has to be that the  
25 spillover is so great that it impacts one of the substantive

1 rights. And in this case, it's not like Mr. Lawniczak is  
2 charged with tax fraud and the others are charged with child  
3 pornography.

4 The evidence against Mr. Lawniczak is still severe  
5 child abuse, and the stuff that would come in is still  
6 related to Website A, still related to his knowledge of  
7 Website A or what happened to those pictures that were taken  
8 in the house and why the connection is to Website A as well  
9 as the connection of all of the relationships of these  
10 defendants.

11 And so all of that is still going to be coming in  
12 against Mr. Lawniczak. And just because he may be less  
13 culpable than some of the defendants is not a reason for  
14 severance when you do have the strong preference for joint  
15 trials and you do have such overlapping evidence.

16 And I have no doubt that Mr. Nishi will be able to  
17 make the arguments to the jury of why his defendant is  
18 different. In fact that is exactly the arguments he makes  
19 in that motion. And I have no doubt the parties and the  
20 Court would be able to come up with an appropriate limiting  
21 instruction that does separate what evidence goes towards  
22 each defendant.

23 He just does not raise the claim of why these  
24 case -- why this should be separate when there is such a  
25 unity of the crimes and the evidence involved in all of

1     them.

2                   THE COURT:  If you wouldn't mind indulging me,  
3     Ms. Kupersmith, you are saying -- how many counts in this  
4     Indictment?

5                   MS. KUPERSMITH:  I believe it's 20.

6                   THE COURT:  Right.  The first Superceding  
7     Indictment has --

8                   MS. KUPERSMITH:  Nineteen.

9                   THE COURT:  -- nineteen counts.

10                  Walk me through the overlap between Mr. Lawniczak  
11     and the other defendants count by count.

12                  MS. KUPERSMITH:  Certainly.

13                  So Count 1 is pretty self-explanatory.  It's the  
14     child exploitation enterprise, but I would point out  
15     specifically within that count there is allegations specific  
16     to Mr. Lawniczak that acts took place at his home --

17                  THE COURT:  Slow down so I can get it and our  
18     court reporter will get it.

19                  MS. KUPERSMITH:  On at least one occasion  
20     Mr. Lawniczak used a minor to produce child pornography with  
21     an identifying placard that's similar to those used in  
22     Website A.

23                  Additionally, his connection to the child was  
24     through his relationship with Mr. Brinson and Mr. Brinson's  
25     connection to that child.

1 Further, both Count 1 and Count 18 allege that  
2 Mr. Lawniczak harbored, maintained, or benefited from  
3 participation in a child sex trafficking venture involving a  
4 minor victim who was brought to Mr. Lawniczak's house  
5 because of his connection with -- between the connection of  
6 Defendant Harrell and Harrell's connection to  
7 Defendant Brinson.

8 In that charge evidence would involve child  
9 pornography images that were produced in the house that  
10 depict placards like those that Mr. Harrell and Mr. Brinson  
11 used on Website A. And that is significantly overlapped  
12 with Count 17.

13 Additionally, for Count 19 against Mr. Lawniczak,  
14 it relates to the destruction of text messages that are  
15 between Mr. Lawniczak and Mr. Brinson and specifically  
16 relate to Mr. Lawniczak's knowledge of Mr. Brinson's abuse  
17 of children in that house as well as Mr. Lawniczak's sexual  
18 interest in children, including the named victims that are  
19 involved in Count 1, Count 17, Count -- I believe there are  
20 some of the production counts as well -- Count 10, Count 13,  
21 and Count 14.

22 Again, that's just on the face of the Indictment  
23 itself. So you have significant overlapping of just that.

24 And in addition, the government, since the charges  
25 have been filed, there has been additional evidence and the

1 investigation has revealed and discovery has been provided  
2 of Lawniczak's knowledge of Website A, his presence in the  
3 house when other child pornography was produced, including  
4 at times when Mr. Harrell was present.

5 THE COURT: When you say -- what does "presence"  
6 mean? Presence in the house when it was being produced,  
7 meaning was he involved in filming or in the production or  
8 just happens to be in the home when the pornography was  
9 being produced?

10 MS. KUPERSMITH: I think some of it is unclear,  
11 and some of it is going to depend on, kind of, how the  
12 evidence comes out or witness statements, but there is  
13 indications that Mr. Harrell and Mr. Brinson met at  
14 Mr. Lawniczak's house at times and produced child  
15 pornography of some of the victims together at times that we  
16 know that Mr. Lawniczak was home.

17 And so there is indications, especially with the  
18 text messages and the other evidence that we have, that it's  
19 possible that Mr. Lawniczak was involved in that, but we  
20 don't know for sure.

21 THE COURT: Should the Court -- well, I'll just  
22 ask. Is there a possibility there will be a Superseding  
23 Indictment in light of this evidence, or is this just  
24 evidence that has come out during the course of your  
25 preparation for trial?

1 MS. KUPERSMITH: Your Honor, it is certainly  
2 possible. I think some of it depends on what's happening  
3 with these motions today, and what happens is kind of the  
4 ability of the parties to reach some type of resolution of  
5 this case, but there are certainly the possibility of other  
6 charges and whether that's in this district or other  
7 districts based on some of this new evidence.

8 THE COURT: I just want to be sure I understand.

9 The overlap -- the counts that relate to overlap  
10 are Counts 1, which is the enterprise, Count 18 about the  
11 harboring children and to maintain a benefit, and Count 19  
12 talks about the destruction of the text messages.

13 But your hook, if you will, is the fact that it  
14 deals with destruction of text messages regarding abuse of  
15 children that are named in other counts.

16 MS. KUPERSMITH: Yes, Your Honor.

17 THE COURT: Okay. All right.

18 Anything further?

19 MS. KUPERSMITH: Let me just have one moment.

20 THE COURT: Take your time, please.

21 MS. KUPERSMITH: So part of the other -- the  
22 evidence that has been developed since the investigation in  
23 this case is specifically Mr. Lawniczak's participation in  
24 the abuse of one of the named victims, and that victim is  
25 named in the -- several of the different counts. He is

1 named in Count 1 in some of the predicate offenses of that  
2 as well as Count 14, the production account that is  
3 specifically against Mr. Brinson and --

4 THE COURT: Uncharged conduct. Correct?

5 MS. KUPERSMITH: It is uncharged except to the  
6 extent it goes to the predicate offenses of Count 1.

7 THE COURT: Go ahead.

8 MS. KUPERSMITH: The overall point is there is  
9 significant overlapping evidence with Mr. Lawniczak's  
10 charges as well as the other ones. In many cases that  
11 involve co-defendants and conspiracies, there is a disparity  
12 of evidence.

13 However, just the existence of the disparity of  
14 evidence is not sufficient to sever specifically when you  
15 have such unity of the crimes and the evidence as well as  
16 the subject matter of the different crimes and the strong  
17 preference for joint trials.

18 And I would just submit that there haven't been  
19 any grounds upon which Mr. Lawniczak is seeking severance  
20 that rises to the level that the Courts have approved.

21 THE COURT: Thank you, Ms. Kupersmith.

22 Mr. Nishi, anything further?

23 MR. NISHI: Nothing further, Your Honor.

24 THE COURT: Thank you, Counsel. All right.

25 So we've talked about a lot here. During the



1 recess I had a chance to try to look at some of the other  
2 evidence that has been referenced during the course of these  
3 discussions. There is lots to go over here, and I am  
4 prepared to rule at this time.

5 And so as it relates to -- we'll start with  
6 Mr. Harrell's motion to suppress to the statement. I am  
7 going to deny that motion. Look. The government, as I  
8 indicated earlier, they do not intend to introduce any of  
9 the statements made, at least when he -- after he invoked  
10 and questions that were not in response to -- responses that  
11 were made -- or I should say statements that were made that  
12 were not in response to any interrogation.

13 I think the evidence is pretty clear that  
14 Mr. Harrell understood his Miranda rights. Going through  
15 the interview again he says, "Yeah, this is the interview  
16 now."

17 "Do you understand?"

18 "I think I understand." He then signs a written  
19 statement of rights and waiver form.

20 I think the statement that, in the context of this  
21 whole discussion, his statement that he thinks he  
22 understands was in response to whether or not -- was in  
23 response to Special Agent Squire's question of whether he  
24 wanted to read his rights.

25 So I think there is clear evidence that

1 Mr. Harrell knew and understood and voluntarily waived his  
2 rights.

3 Similarly, when you go back to -- you look back to  
4 the conversation that took place in the car, they go over  
5 all those rights again. He seems, at least to the Court, to  
6 understand those rights indicating that he is willing to  
7 talk, and so the motion to suppress his statements will be  
8 denied.

9 As it relates to the motion to suppress evidence,  
10 the search warrant at his parents' home, I understand the  
11 defense's argument about FS 1, but I don't think that the  
12 standard is such that you need to have, for lack of a better  
13 term, fully vetted FS 1.

14 This is information that was provided to law  
15 enforcement, they corroborated this information -- just want  
16 to go through my notes from this hearing.

17 (Brief pause in the proceedings.)

18 THE COURT: Yes. Ultimately, I think there was  
19 enough evidence of the corroboration of the information that  
20 was provided by FS 1. Talking about sufficiently  
21 identifying information about a person named Soole and  
22 War Titan, all of those connected to Mr. Harrell. Then we  
23 find out that Mr. Harrell lives at a place that's registered  
24 as a day care center. There is photography or photos  
25 showing that he worked at the Cinemark theater, same type of

1 theater that Soole sent photographs to FS 1.

2 So I think there is enough corroborating evidence,  
3 and the tip was more than sufficient to meet the burden of  
4 probable cause to issue a warrant in this case.

5 Next, as relates to Mr. Harrell's motion to sever,  
6 again, I think there is significant overlap with all the  
7 counts here as mentioned in both motions to sever. It is a  
8 very high burden to show a clear manifest or undue prejudice  
9 from a joint trial, and I don't think that that burden has  
10 been met in this case; so Mr. Harrell's motion to sever is  
11 denied.

12 Now we move on to Mr. Brinson. Mr. Nicolaysen  
13 presented a very impassioned and thorough argument as well  
14 with respect to the motion to suppress post-arrest  
15 statements.

16 Respectfully I don't agree. Ultimately I am going  
17 to deny the motion to suppress the statements. He was read  
18 the Miranda rights. I think it was clear that he understood  
19 those rights, he knowingly gave them up. I believe the  
20 statement, "You said I could have an attorney," is not an  
21 invocation. It is a question.

22 I don't believe there has been evidence -- or  
23 adequate evidence that there was -- of someone's will being  
24 overborne during the process. Yes, the interview took many  
25 hours but that -- wrong or right, that's what happens in

1 these types of cases.

2 They utilize tactics of time to talk with and  
3 perhaps even gain trust or confidence or -- of Mr. Brinson.  
4 But I don't believe that there is evidence that there was --  
5 that somehow he was overtaken and that his physical  
6 condition or -- his physical condition somehow impacted his  
7 ability to knowingly and voluntarily waive his rights and  
8 engage in a discussion.

9 I'm not as convinced as the government that the  
10 follow-up letter further supports it, but I don't think it's  
11 necessary for purposes of this analysis.

12 The motion to suppress -- so the motion to  
13 suppress statements is denied.

14 Moving on to the motion to suppress the physical  
15 evidence. Again, there are a lot of issues here. I  
16 ultimately do not believe a Franks hearing is warranted  
17 because there was probable cause ultimately to search this  
18 car for a number of reasons.

19 I believe, based on the evidence that was  
20 presented, that the agents saw Mr. Brinson walking to the  
21 car and they were able to see his computer bag and blanket  
22 in plain view, whether it was through the tint or through  
23 the open door, and I do agree with the government that the  
24 statements that Mr. Nicolaysen so adequately and  
25 articulately pointed out as perhaps inconsistent or raising

1 questions -- I think ultimately those statements don't  
2 really have anything to do with probable cause.

3 And as -- and I disagree with Mr. Nicolaysen as it  
4 relates to the issue of seeing an individual charged or  
5 believed to be involved in a criminal enterprise involving  
6 child exploitation and child abuse with a victim. I think  
7 law enforcement could easily have been of the belief that  
8 there may be evidence of a crime contained in the car.

9 I think it is similar to the car chase scenario  
10 that Mr. Nicolaysen described because we don't know where  
11 this abuse took place -- or we have evidence that abuse took  
12 place in some location but we don't know if that's the limit  
13 of that, and I think it was reasonable for the officers to  
14 believe that there might be evidence of crime contained in  
15 the car.

16 I also believe that this does fit within the  
17 automobile exception. Once all of this stuff was done, you  
18 have a car that was parked on the wrong side of the street.  
19 It was going to get towed. I think there was a realistic  
20 concern that, given the nature of the charges and given  
21 that -- the proximity of the car to the victim's family  
22 members, that there might be some issues as it relates to  
23 the car's security and damage to that car.

24 Based on that, I am going to deny the motion to  
25 suppress the physical evidence as it relates to Mr. Brinson.

1           Finally and lastly is the motion to sever. And I  
2 will acknowledge this was one that I wrestled with at length  
3 prior to the hearing, trying to read all the cases I could  
4 on this because admittedly in the big scheme of things  
5 Mr. Lawniczak's allegations and the evidence is not as  
6 voluminous, if you will, compared to the co-defendants.

7           But the case law makes clear that's not  
8 necessarily the standard, and that's not a basis to sever.

9           Like Mr. Brinson, and quite frankly with all the  
10 defendants in this case, there is significant spillover of  
11 the evidence in this case but not so great that it impacts  
12 Mr. Lawniczak's rights.

13           I had the government outline just moments ago  
14 going through the counts, you are talking about several  
15 counts involving an enterprise, Mr. Lawniczak's involvement  
16 with respect to harboring a victim in the case,  
17 destruction -- or I should say obstruction of evidence  
18 concerning text messages that outline at length the abuse of  
19 children that are alleged in the counts. It seems to me  
20 overall the burden has not been met to justify a severance  
21 in this case.

22           So accordingly I am going to deny the motion to  
23 sever.

24           If I understand correctly, we do have a trial date  
25 set in this case for -- well, we have a status conference

1 January 17th and jury trial date on the 28th. So unless  
2 there is anything further that we need to discuss today, I  
3 will see you all for purposes of the trial.

4 Miss Myers.

5 MS. MYERS: One quick point of clarification,  
6 Your Honor. I think this was implied from the facts of your  
7 ruling, but I just want to make it clear that you are  
8 denying Defendant Harrell's motion to suppress the evidence?

9 THE COURT: Yes. If I did not make that clear --  
10 I am sorry. I thought I went through my list of all the  
11 motions.

12 MS. MYERS: You did. You just didn't use the word  
13 "deny."

14 THE COURT: I didn't use the buzz word. So, yes,  
15 the motion is denied.

16 Anything further from the government?

17 MS. MYERS: No, Your Honor.

18 THE COURT: Anything further from the defense?

19 We'll start with Mr. Nicolaysen.

20 MR. NICOLAYSEN: Not from Defendant Brinson,  
21 Your Honor. Thank you for the Court's time.

22 THE COURT: All right.

23 Mr. Castillo?

24 MR. CASTILLO: No, Your Honor. Thank you.

25 THE COURT: Mr. Nishi?

1 MR. NISHI: No, Your Honor.

2 THE COURT: All right. Have a good day, everyone.

3 THE CLERK: All rise. This Court is adjourned.

4 (Proceedings concluded at 12:51 p.m.)

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CERTIFICATE

I hereby certify that pursuant to Section 753,  
Title 28, United States Code, the foregoing is a true and  
correct transcript of the stenographically reported  
proceedings held in the above-entitled matter and that the  
transcript page format is in conformance with the  
regulations of the Judicial Conference of the United States.

Date: May 23, 2022.

/S/ CHIA MEI JUI

Chia Mei Jui, CSR No. 3287